

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 202

CHARLES EDWARD SANDERS, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1 In the United States District Court for the Northern District of California, Northern Division

No. 12310

UNITED STATES OF AMERICA, PLAINTIFF

v.

CHARLES EDWARD SANDERS, DEFENDANT

Before Hon. SHERRILL HALBERT, Judge

Reporter's transcript of proceedings at time of plea

Monday, January 19, 1959

[File endorsement omitted.]

Appearances

For the Government: (Defendant waived counsel.)

G. JOSEPH BERTAIN, Esq.,
Assistant United States Attorney.

2 MONDAY, JANUARY 19, 1959—9:50 A.M.

The CLERK. Are there any ex parte matters?

Mr. BERTAIN. Yes, there are, your Honor. In the case of United States against Charles Edward Sanders. Mr. Sanders, will you step up here, please? Let the record show that I now hand Mr. Sanders a copy of the proposed information against him charging him with bank robbery.

In proceedings Friday before the United States Commissioner, your Honor, Mr. Sanders indicated that he wishes to proceed by waiver of indictment and the filing of an information against him.

The COURT. Is your true name Charles Edward Sanders?

The DEFENDANT. Yes, sir.

The COURT. Mr. Sanders, you are before the Court at this time as the result of a charge having been lodged against you for violation of Title 18, United States Code, Section 2113-A,

bank robbery. It is alleged in the charge that on or about the 16th day of January, 1959, you took from Frances C. Collins certain money or property, to wit, approximately \$220, she being an officer of the Crocker-Anglo Bank here in Sacramento.

This a felony, a crime, for which you can be fined or imprisoned or both.

Under the law you have certain rights which I want to explain to you. The first of these is you have a right to 3 have an attorney at all stages of these proceedings.

That is, you have a right to have a lawyer to advise and counsel with you and represent you if you so desire. If you desire the services of an attorney I will see that you are afforded the opportunity to have one. That is a right which you can waive and proceed without an attorney if you wish to do so; but if you want to proceed without an attorney you will have to tell me that you know that you have the right to have an attorney and you expressly waive that right here in open court.

Now what are your wishes in this matter, do you desire the services of an attorney?

The DEFENDANT. No, your Honor.

The COURT. You understand you have the right to have one, do you?

The DEFENDANT. Yes, your Honor.

The COURT. And you now waive that here in open court?

The DEFENDANT. Yes.

The COURT. In addition thereto, Mr. Sanders, you have a right to have this matter heard by the grand jury of this court, for this is a felony and no person can be brought to trial in this court on a felony charge except by the indictment of the grand jury, unless they waive that right and desire to proceed by way of information. If you wish to do that you may do so, but you will have to tell me that you know that you have the right to have the matter heard by the grand jury and that you waive that right here in open court.

4 In addition I will say to you that I can accept from you only a plea of guilty on this charge, for if you think you are not guilty of this charge you should have the matter heard by the grand jury to determine whether or not you should even be brought here for trial.

Having in mind all that I have told you do you wish to have the matter heard by the grand jury?

The DEFENDANT. No, your honor, I waive it.

The COURT. I didn't hear that.

The DEFENDANT. I waive that right.

The COURT. You waive that right?

The DEFENDANT. Yes.

The COURT. You understand you do have the right, though?

The DEFENDANT. Yes.

The COURT. And you now want to proceed without indictment and by way of information?

The DEFENDANT. Yes.

The COURT. Now, Mr. Sanders, has anybody made any threats against you to get you to proceed in this fashion?

The DEFENDANT. No, your Honor.

The COURT. Has any one made any promises to you if you will proceed in this fashion?

The DEFENDANT. No, your Honor.

The COURT. You understand that it is being done freely and voluntarily of your own will and wish, is that right?

5 The DEFENDANT. Yes.

The COURT. Very well, you may take the necessary waiver and file your information.

(The defendant signs document.)

Mr. BERTAIN. Let the record show that the defendant, Mr. Sanders, has signed the waiver of indictment. The same is witnessed by Mr. Erich, deputy United States Marshal and we ask leave of court to file the same at this time, your Honor.

The COURT. It may be received and filed.

The CLERK. The United States Attorney for this division and district has filed an information charging violation of Title 18 United States Code, Section 2113-A, bank robbery, against Charles Edward Sanders. Do you have a copy of this information?

The DEFENDANT. Yes, sir.

The CLERK. The United States Attorney charges, (1), that at all times herein mentioned the Crocker-Anglo National Bank, Capital Office, Sacramento, Sacramento County, California, hereinafter referred to as said bank, was a bank duly

organized and existing under the laws of the State of California, and an insured bank as defined in subsection (h), section 1813, Title 12, United States Code, Federal Deposits Insurance Act. That is to say, the deposits of said bank were at all times herein mentioned insured by the Federal Deposits Insurance Corporation in accordance with the provisions of
6 the Federal Deposits Insurance Act, as amended.

That the said bank was a member of the Federal Reserve System; that said bank was at all times herein mentioned doing a general banking business in Sacramento, County of Sacramento, State of California; that at all times herein mentioned Frances C. Cullen was a teller of said bank and acting as such.

(2) On the 16th day of January, 1959, in the city of Sacramento, County of Sacramento, in the northern division of the northern district of California, and within the jurisdiction of this court, Charles Edward Sanders, the defendant herein, then and there by intimidation did unlawfully, wilfully and feloniously take from the presence of said Frances C. Cullen certain money and property, to wit, approximately \$220 lawful money of the United States, which said money and property then and there did belong to, and was under the care, custody and control of, said bank.

Mr. Sanders, do you understand the charge in this information?

The DEFENDANT. Yes.

The CLERK. The information is in one count. Are you ready at this time to enter a plea?

The DEFENDANT. Yes, sir.

The CLERK. What is your plea, guilty or not guilty?

The DEFENDANT. Guilty.

The CLERK. Guilty.

The COURT. Let the plea be entered. This matter will be referred to the probation officer for his consideration and report. I will continue this matter over to Monday, February 2, 1959, at the hour of 9:30 A.M. At that time I will consider probation and it is also fixed as the time for the pronouncement of judgment in this case.

What about bail in this matter?

Mr. BERTAIN. Suggest a bail of \$10,000, your Honor.

The COURT. Let bail be fixed in the amount of \$10,000 in this case. The defendant is remanded to the custody of the marshal pending this presentence investigation.

(Further proceedings in this matter were continued to February 2, 1959, at 9:30 A.M., at which time they were continued to February 3, 1959, at 9:30 A.M. at which time they were continued to Tuesday, February 10, 1959, at 9:30 A.M.)

8 In United States District Court for the Northern District of California, Northern Division

No. 12310

Waiver of Indictment

Filed January 19, 1959

[Title omitted.]

[File endorsement omitted.]

Charles Edward Sanders the above named defendant, who is accused of—Title 18, United States Code, Section 2113(a)—Bank Robbery, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

Charles Edward Sanders.

CHARLES EDWARD SANDERS,

Defendant.

Witness.

Counsel for Defendant.

9 In the United States District Court for the Northern
District of California, Northern Division

Cr. No. 12310

Information

Filed January 19, 1959

18 U.S.C. 2113(a)—Bank Robbery

[Title omitted.]

[File endorsement omitted.]

The United States Attorney charges:

1. That at all times herein mentioned, the Crocker-Anglo National Bank, Capital Office, Sacramento, Sacramento County, California, hereinafter referred to as "said bank," was a bank duly organized and existing under the laws of the State of California and an insured bank as defined in subsection (h) of Section 1813 of Title 12, United States Code (Federal Deposits Insurance Act), that is to say—the deposits of said bank were at all times herein mentioned insured by the Federal Deposits Insurance Corporation in accordance with the provisions of the Federal Deposits Insurance Act, as amended; that said bank was a member of the Federal Reserve System; that said bank was at all times herein mentioned doing a general banking business at Sacramento, County of Sacramento, State of California. At all times herein mentioned Frances C. Cullen
10 was a Teller of said bank and acting as such.

II. On the 16th day of January, 1959, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this Court, Charles Edward Sanders, the defendant herein, did then and there by intimidation, unlawfully, wilfully and feloniously take from the presence of said Frances C. Cullen certain money and property, to wit: approximately \$220.00 lawful money of the United States, which said money

and property then and there did belong to and was in the care, custody and control of said bank.

(18 USC 2113(a).)

ROBERT H. SCHNACKE,

United States Attorney.

By G. Joseph Bertain, Jr.,

G. JOSEPH BERTAIN, JR.,

Assistant U.S. Attorney.

11

In United States District Court

Reporter's Transcript of Sentence

February 10, 1959

TUESDAY, FEBRUARY 10, 1959—9:30 A.M.

The CLERK. Case No. 12316, U.S. v. Charles Edward Sanders, for judgment.

The COURT. In this case this defendant has heretofore been before this court on an information charging him with a violation of Title 18 United States Code, Section 2113-A, bank robbery. The defendant appeared before the Court, waived the aid of counsel, was arraigned and entered a plea of guilty to the offense set forth in the indictment.

The matter was referred to the probation officer for his consideration and report. He has provided me with a report which I have read and examined.

This is the time and place fixed for the consideration of probation in this case and also for the pronouncement of judgment in this case.

Is there anything to add to this report, Mr. Nicholson?

Probation Officer NICHOLSON. No, your Honor.

The COURT. Mr. Bertain, is there anything that the Government desires to say?

Mr. BERTAIN. No, your Honor.

The COURT. Is there anything you want to say, Mr. Sanders, before judgment is pronounced?

Mr. SANDERS. If possible, your Honor, I would like to go to Springfield or Lexington for addiction cure. I have been using narcotics off and on for quite a while.

12 The COURT. Well, I am willing to recommend that. Of course, it is up to the Attorney General what is done in that regard. But I suggest that it be noted that this man has indicated that he has had difficulty with narcotics and he desires to be treated, and I think that is not only humane but proper and just under the circumstances.

In this case, Mr. Sanders, it is the judgment of the Court and the sentence of the law that for this offense to which you have entered a plea of guilty you be imprisoned in a federal penitentiary for a term of 15 years, the institution to be selected by the Attorney General.

The defendant is remanded to the custody of the marshal for delivery into the custody of the authorities of the institution selected by the Attorney General.

These recommendations may be incorporated in the report.
[Reporter's certificate to foregoing transcript omitted in printing.]

13 In United States District Court for the Northern
District of California, Northern Division

No. 12310

UNITED STATES OF AMERICA

v.

CHARLES EDWARD SANDERS

Judgement and commitment

February 10, 1959

[File endorsement omitted.]

On this 10th day of February, 1959 came the attorney for the government and the defendant appeared in person and¹

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

without counsel; the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel.

It is adjudged that the defendant has been convicted upon his plea of ² Guilty of the offense of violation of Title 18 U.S.C., Section 2113(a), (Bank Robbery) in that on or about January 16th, 1959 in Sacramento, California, he did by intimidation, unlawfully, wilfully and feloniously take certain money belonging to a Bank insured under the Federal Deposits Insurance Act as charged ² in the Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

*It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years.

It is adjudged that ⁵

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

SHERRILL HALBERT,
United States, District Judge.

The Court recommends commitment to: ⁶ a Medical Facility for treatment.

¹ Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

² Insert "in count(s) number" if required.

³ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

⁴ Enter any order with respect to suspension and probation.

⁵ For use of Court wishing to recommend a particular institution.

Entered in Criminal Docket February 11, 1959.

C. W. CALBREATH,

By _____

Deputy Clerk.

14 In the United States District Court for the Northern
District of California, Sacramento

Title 28 U.S.C. Section 2255

IN THE MATTER OF APPLICATION,
CHARLES EDWARD SANDERS, DEFENDANT

v.

THE UNITED STATES OF AMERICA, PLAINTIFF

Motion to vacate and set aside an illegal sentence

Filed January 4, 1960 .

[File endorsement omitted.]

Comes now the Petitioner, Charles Edward Sanders, an American Citizen to Petition the Court to Set Aside and Vacate Sentence on the following grounds:

I

The Petitioner challenges the validity of the Indictment and the Petitioner feels that his Constitutional rights has been violated.

II

The United States District Court for the Northern District of California was without Jurisdiction, Judgment, and Sentence in the Case at bar, due to the violation of the Appellant's Constitutional Rights. The Appellant was denied adequate assistance of Counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of America.

The Trial Court's action of denying to the Appellant adequate assistance of Counsel, violated the Constitutional Rights of the Petitioner as provided by the Fourteenth Amendment to the Constitutional guaranteeing due process of law and equal protection of law.

III

The United States District Court for the Northern District of California lost Jurisdiction in the Case at bar when said Court allowed the Appellant to be intimidated and coerced into entering a plea without Counsel, and any knowledge of the charges lodged against the Appellant.

15

ARGUMENT

"In all criminal prosecution, the accused shall enjoy the right—to have the assistance of counsel for his defense." Constitution of the United States, Fourteenth Amendment.

"The assistance of counsel means the effective assistance of counsel in the preparation and trial of the cause." Edwards v. U.S. 78 US app. D.C. 139 F 2d, 365, 367 N. 4.

In United States (Ex rel.) Mitchell v. Thompson, 56 F Supp. 683, 687 (2d NT, 1944), the Court habeas corpus had been accorded his rights to assistance of Counsel under the 6th Amendment, States:

"In order to determine whether petitioner has been deprived of his constitutional right it becomes my duty to canvass the several factors relevant thereto regardless whether they fit into the precise terms of issues as stipulated. These facts are: (1) The time of appointment; (2) The opportunity afforded the appointee to confer and prepare; and (3) The qualification of the appointee."

In the leading case, Powell v Alabama, 28 US, 45, 58, the United States Supreme Court stated:

"It is not enough to assume that the counsel thus precipitated into the case though there was no defense. Neither they nor the Court may say what prompt and thorough investigation might disclose as to the facts; no attempt was made to investigate . . . under the circumstances disclosed, we hold that the defendant was not accorded the right to counsel in any substantial sense, to decide otherwise would be to ignore the realities."

It is important that this Court note the following paragraph quoted from Section 226, F.C.C.

"The defendant's Attorney generally waives the reading of the Indictment by the Clerk of the Court to the defendant, and

pleads his client not guilty, obtaining leave of the Court to withdraw the plea if he should desire to enterpose a motion to quash or Demurrer to the Indictment. In most cases it is desirable to obtain as long a postponement of the trial as possible."

16 "—a conviction on a plea of guilty, coerced by a Federal Law Enforcement Officer is no more consistent with Due Process than a conviction supported by a coerced confession—in such circumstances the use of a conviction for a crime is not restricted to those cases where the judgment of conviction is void for the want of jurisdiction of the trial court to render it. It extends also to those cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Moore v. Dempsey, 261 US 86; Mooney v. Holohan, 294 US 103; Bowen v. Johnson 306 US 1924.

In U.S. v. Calhoun, 257 F. 2d 637; In U.S. v. Cruckshank (72 US 542, 557, 558, 23 L. Ed. 588), The Supreme Court said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the Constitutional right to be informed of the nature and cause of the accusation. Amend. VI. In U.S. v. Mills, 7 pet. 142, This was construed to mean, that the Indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and In U.S. v Cook, 17 wall 174, that every ingredient of which the offense is composed must be accurately and clearly alleged."

This Court must agree whereas the principal support by the above cases shows that the jurisdiction of a Court may be lost after it has once-attached, not only by defective constitution of the tribunal or by action or failure to act on the part of the Court, but also, by illegal activities of prosecuting and law enforcement officers outside of the Court and of which the Court may not even be aware.

In the case at bar the proceedings of the trial were by no means fair and impartial to ensure due process of law. The Petitioner was denied assistance of Counsel, and there was no adequate investigation of the facts.

The 6th Amendment guarantees that an accused of a Federal Crime shall enjoy the right to assistance of counsel at the time of argument and plea.

17 *Cases Cited for Argument:* Micherer vs. Johnson 141 F 2d 171 172 C.C.A. 9th. Mills vs. United States 185 F 2d 137 5th Circuit. Evans vs. Rieres 126 F 2d 633, 637, 641 75 App. D.C. 242, Robinson vs. Johnson 50 F Supp, 727, 778 Md. Cal. 1943.

Also See: Hunter vs. U.S., 10th Cir., 166 F 2d 721, 334, US 848, 68 S Ct. 1499, 92 L. Ed. 1772; "mere perfunctory appearance for a defendant is not enough." Powell vs. Alabama, *Supra* 287 US at pp 58, 71, 53 S Ct. 55 77 L Ed. 158, 84 A.L.R. 527. Glasser vs. U.S., 315 US 60, 76, 62, S. Ct. 457, 86 L. Ed. 680. Avery vs. Alabama, 308 US 444, 446, 60, S. Ct. 321 84, L Ed. 377. Johnson vs. U.S., 71 App. D.C. 400, 110 F 2d 562. Forly vs. Rogen, D.C. 52 F Supp. 265, 270.

Respectfully submitted.

Charles Edward Sanders,
CHARLES EDWARD SANDERS,
Prop. Persona.

18 In the United States District Court for the Northern District of California, Sacramento

Case No. —————

CHARLES EDWARD SANDERS, PETITIONER
vs.

THE UNITED STATES OF AMERICA, RESPONDENT, ET. AL.

In Re: U.S.A vs. Charles Edward Sanders

Petition for the writ of habeas corpus-ad-testificandum

To: The Honorable Presiding Judge, U.S. District Court,
North District of California:

May it please the court:

Charles Edward Sanders, your Petitioner herein, who is presently confined under authority of commitment of the U.S. District Court for the Northern District of California, in the custody of David M. Heritage, Warden of the U.S. Penitentiary, McNeil Island, Steilacoom, Washington, committed under Register No. 27397-M, makes application to this Court for the

14 CHARLES EDWARD SANDERS VS. UNITED STATES

Northern District of California, commanding and requiring said U.S. Marshal to henceforth take possession of the body of Charles Edward Sanders before the Bar of the Court for the purpose of testifying in behalf of Motion pending hearing before this Honorable Court, under Title 28, U.S.C., Section 2255. This said Motion was filed with the U.S. Clerk for the Northern District of California at the same time as this Petition, at a time and place designated by the Court for such hearing.

Respectfully submitted.

Charles Edward Sanders,
CHARLES EDWARD SANDERS,

Petitioner.

Subscribed and Sworn to before me this day of....
....., 1959.

Authorized by Title 18, U.S.C., Sec. 4004.

**.19 In the United States District Court for the Northern
District of California, Sacramento**

CHARLES EDWARD SANDERS, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT, ET AL.

Affidavit and motion to proceed in Forma-pauperis:

Filed January 4, 1960

[File endorsement omitted.]

To: the Above Court, The Honorable Presiding Judge:

Greetings:

Comes now Petitioner, Charles Edward Sanders, propria-persona, pursuant to this Honorable Court recognition of this Court, Petitioner respectfully represents and agrees as follows: That he is without monies within the provision set forth in Law.

When he is entitled 28 U.S.C. Section 1915 determines his being eligible to proceed in forma pauperis pursuant to such recognition of this Honorable Court, because of his poverty he

is unable to prepay the cost of this Action, or to give security for same.

Petitioner is a Citizen of the United States of America and verily believes that he has meritorious cause of Action, and because of his poverty is unable to secure prepayment of Court Proceedings. In case of this Court denying him his freedom in the attached Motion to Vacate and Set Aside Sentence, to this entitled cause of action, Petitioner prays for permission to proceed in Forma-Pauperis, and a Forma-Pauperis to be known and granted by this Honorable Court.

Respectfully submitted.

Charles Edward Sanders,
CHARLES EDWARD SANDERS,
Petitioner.

20 In the United States District Court for the Northern District of California, Northern Division

Cr. No. 12310

Memorandum and order

February 3, 1960

[Title omitted.]

[File endorsement omitted.]

This is a motion made, under the provisions of Title 28 U.S.C. § 2255, to set aside and vacate the sentence imposed by this Court upon the defendant, Charles Edward Sanders. In conjunction with the motion, defendant has filed an application for a writ of habeas corpus ad testificandum directed to the Warden of the Federal Penitentiary at McNeil Island, in which defendant is presently confined as the result of the above sentence. The purpose of this latter application is to enable defendant to testify in support of his motion to set aside and vacate the sentence.

The files and records of this case show the following facts: The defendant was brought before this Court on Monday, January 19, 1959, charged with a violation of Title 18, U.S.C. § 2113(a) (Bank Robbery). The charge

was explained to the defendant, and a copy of the proposed information was handed to him. The Court explained to the defendant that he had a right to counsel, and he stated that he understood this right and wished to waive it. It was explained to the defendant that he could not be proceeded against except by indictment by the grand jury, unless he waived that right, and the nature of the charge was emphasized to defendant. Defendant stated that he understood, waived his right to be proceeded against by indictment, and that he wished to be proceeded against by information. In response to questioning by the Court, defendant stated that he had decided to proceed in this fashion freely and voluntarily of his own will and wish, and that no threats or promises had been made to induce him to take such action. Defendant signed a waiver of indictment, the charge was read to him, he stated that he understood the charge, and he then entered a plea of guilty.

The contentions made by defendant on this motion are: (1) He "challenges the validity of the indictment"; (2) he was denied adequate assistance of counsel; and (3) he was intimidated and coerced into entering a plea without counsel and without any knowledge of the charges against him.

Defendant's motion, although replete with conclusions, sets forth no facts upon which such conclusions can be founded.

For this reason alone, this motion may be denied without a hearing (United States vs. Sturm, 180 F. 2d. 413; and United States vs. Mathisor, 256 F. 2d 803).

This motion sets forth nothing but unsupported charges, which are completely refuted by the files and records of this case. Since the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, no hearing on the motion is necessary (Title 28, U.S.C. § 2255; United States vs. Sturm, *supra*; United States vs. Mathison, *supra*; and Johnson vs. United States, 239 F. 2d 698).

It is, therefore, ordered that defendant's motion to set aside and vacate the sentence imposed upon him by this Court be, and it is, hereby denied;

And it is further ordered that defendant's application for a writ of habeas corpus ad testificandum be, and it is, hereby denied.

Dated: February 3, 1960.

SHERRILL HALBERT,
United States District Judge.

23 In United States District Court, Northern District of California, Northern Division

Case No. 12310

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[File endorsement omitted.]

Motion to Vacate Sentence

Filed Sept. 8, 1960

Comes now Charles Edward Sanders and moves the Court to vacate the conviction and judgment in the above entitled case on the ground that his conviction was obtained in violation of the constitution and laws of the United States because that at the time of trial and sentence the petitioner was mentally incompetent and was unable to cooperate intelligently in his defense; that his mental incompetency was the result of administration of narcotic drug during the period petitioner was held in the Sacramento County Jail pending trial in the instant case.

Wherefore, it is moved that the sentence and conviction be vacated in the above entitle pursuant to 28 U.S.C. 2255.

18

CHARLES EDWARD SANDERS VS. UNITED STATES

24

In the United States District Court for the
Northern District of California, Northern Division

Case No. 12310

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

Memorandum in support of motion

THE PETITIONER ALLEGES IN HIS MOTION THAT HE WAS
MENTALLY INCOMPETENT AT THE TIME OF HIS TRIAL AND
SENTENCE IN THE INSTANT CASE

Such an allegation is properly raised in a proceeding under Section 2255 of Title 28, United States Code. *Simmons v. United States* 8 Cir., 253 F. 2d 909; *Smith v. United States*, 9 Cir., 267 F. 2d 210. In *Gregori v. United States*, 5 Cir., 243 F. 2d 48, the Court held that such an allegation was raised in a Section 2255 motion where the issue had not been raised at the time of trial. In *Brown v. United States*, 5 Cir., 267 F. 2d 42.

25 The Court stated:

Under the authorities it is now established that the question of insanity at the time of trial may be

Bishop v. United States, 1956, 350, U.S. 961 *Gregori v. United States* 5 Cir., 1957, 243 F. 2d 48; *Simmons v. United States* 8 Cir., 253 F. 2d 909; *C. F. Massay v. Moore*, 348 U.S. 105.

Raised on a Section 2255 motion and the judgment of the District Court is therefore reversed and the case remanded for a hearing on the sanity of the defendant at the time of his trial."

It is now well established that a defendant need not apply for a certificate under 18 U.S.C. A 4245 before applying for relief under 28 U.S.C. A 2255.

26 In *Gregori v. United States*, supra, it was stated in regard to a certificate under 18 U.S.C. A. 4245 as prerequisite to filing under Section 2255 at page 55,

"Thus rather than concluding that Congress intended to restrict in some way the right of an accused to raise the defense

of insanity at the time of trial we find that the intent embodied in the statutory scheme was to make certain that every mentally handicapped defendant have his day in court on this issue. C. F. Wells v. United States, on bane, 99 U.S. App. G.C., 310, 239 F. 2d 931. However this point need not be further labored, since the motion Bishop case was also brought subsequent to the enactment of Section 4245 though the question of a possible conflict of Section 2255 with the later
27 staute was not explicitly considered there." [Emphasis supplied.]

And in Simmons v United States supra, the Court stated at page 913: * * * the effect of the resort to a 2255 motion was also considered in the Gregori case, supr, 243 F. 2d at page 52. It is there pointed out that proceeding under 4245 come into operation only when the Board certifies that it is probable accused was insane at time of trial such a certifies will not issue in cases * * *

There is nothing in the record in the present case indicate
that has issued. We are inclined to agree with the
28 holding of the Fifth Circuit in the Gregori case supra, to
the effect that if a certificate of probable cause has not
issued, the accused should have the right to have the sanity
issue determined under A 2255 motin."

In Ninth Circuit Court of Appeal in *Simth v. United States* supra, commented on this issue as follows at page 212:

The trial judge indicated that, if Simth were applying under 18 U.S.C. A. 4245 it would be necessary for the administrative procedure to be followed before application to the court, but the opinion note above make no such exception.¹

By the above authorities it is evident that application
29 for a certificate under 18 U.S.C. A 4245 is not a
preqvisit to filing of motion to vacate under 28 U.S.C.
A 2255 the allegation that the petitioner was menatlly incom-
petent at the time of trial presents an issue of a fact that re-
quires a hearing at which the petitioner shall be peresnt so
that he may "have his day in court on this issue," *United
States v. Hayman* 342 U.S. 205; *Bishop v. United States* 350
U.S. 961.

In Gregori v. United States, *supra*, at page 55 that the court held: appellant is entitled to a prompt hearing followed by a determination of the issue and the formulation of finding of fact and conclusions of law, as required by 28 U.S.C. A. Section 2255, *Bishop v. United States, supra.*"

30 The case of Smith v. United States, 9 cir., 259 F. 2d 125 as for the right of the appellant to have a hearing upon the question of his sanity at the time of the trial, the whole matter is settled by the decision in Bishop v. United States, 350 U.S. 961 76 S. C.T. 400, 1001 Ed. 835, vacating 96 U.S. App. G.C. 117. 223 F. 2d 582. "According upon the appeal from the denial of the application or motion of March 15, 1957, the order denying the petitioner is reversed and the cause is remanded with directions to provide a hearing upon the allegations of that application." 259 F. 2d at page 127.

See also the case of Smith v. United States, 267 F. 2d 210.

31 Bell v. U.S. 269 F. 2d 419 in Brown v. United States, *supra* that Court directe that the judgment of the District Court is therefore reversed and cause remanded for a hearing on the sanity of movant at the time of his trial."

[Emphsis supplied.]

In Pledger v. U.S. 4 Cir., 272 F. 2d 69, the Court held that the allegation the petitioner was mentally incompetent during his trial owing to the administration of drugs was properly raised in a motion under 28 U.S.C. 2255 and required a hearing.

The instant motion raises dissimilar ground relief and as the issue is with in the purview of Section 2255 this Court is required to entertain it. *Barrett v. Hunter* 180 F. 2d 510;

32

CONCLUSION

It is respectfully submitted that the Court should direct that a hearing be held on the motion to enable the petitioner to present evidence to sustain the motion.

CHARLES EDWARD SANDERS,

Alcatraz, California,

Petitioner.

ALCATRAZ, CALIFORNIA.

33

United States District Court,
Northern Division

Case No. 12310

AFFIDAVITSTATE OF CALIFORNIA,
County of San Francisco, ss:

Charles Edward Sanders haveing been duly sworn deposes and says that he was confined in the Sacramento County during the period from on or about Jan. 16, 1959 until Feb. 18, 1959.

That during period above mentioned the affiant was intermittly under the infulence of drug.

That during the period of the trial the affiant was under infulence of a drug.

That did not understand trial proceeding owing to his mental incompetency cause by the administartion of a durg.
34 That the above mentioned durgs adminstrated by the medical authorties attedent at Sacramento County Jail.

That the above mentioned durgs were given to the affiant because of beeing a known addict.

CHARLES EDWARD SANDERS.

Subscribe and to before this day of 15th day.

August, 1960 A.D.

*Parole Officer authorized by Act of July 7,
1955 to administer oaths (18 U.S.C.4004).*

22

CHARLES EDWARD SANDERS VS. UNITED STATES

35

In the United States District Court for the Northern
District of California, Northern Division

Civil No. 8156

CHARLES EDWARD SANDERS, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

Memorandum and order

September 15, 1960

[File endorsement omitted.]

Petitioner has moved this Court to set aside and vacate the sentence pronounced against him, as the result of his conviction on a plea of guilty to the charge of violation of Title 18 U.S.C. § 2113(a) (bank robbery), in the case of United States v. Sanders, Crim. No. 12310, in the records of this Court. This relief is sought under the provisions of Title 28 U.S.C. § 2255. Petitioner alleges that he was mentally incompetent and incapable of participating intelligently at the time of his plea and sentence. He alleges that the medical authorities in the Sacramento County Jail, in which institution he was held at the time of his plea and sentence, administered 36 narcotic drugs to him from time to time, because he was a known addict, and that these drugs rendered him mentally incompetent as aforesaid.

The record shows that petitioner was sentenced on February 10, 1959. At his request, the Court recommended that he be sent to a medical facility for treatment for narcotic addiction. On January 4, 1960, petitioner filed a motion under Title 28 U.S.C. § 2255, for the same relief which he now seeks. In this latter motion, petitioner made no mention of any mental incompetency caused by narcotic drugs, although the facts (as to his having been or not been drugged as now alleged) must have been known to him at the time of that motion. Petitioner offers, in his present petition, no excuse for the failure to raise the questions, which he seeks to raise now, at the time

he filed the earlier motion. This Court carefully considered and denied on its merits petitioner's earlier motion, by a memorandum and order filed in United States v. Sanders, supra, on February 3, 1960.

This Court is not required to entertain a second motion for similar relief on behalf of petitioner (Title 28 U.S.C. § 2255). As there is no reason given, or apparent to this Court,¹ why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion, the Court will refuse, in the exercise of its statutory discretion, to entertain the present petition (See: Daniels vs. United States, 258 F. 2d 356; Bickford vs. United States, 206 F. 2d 395; Dunn vs. United States, 234 F. 2d 219; and United States vs. Brown, 207 F. 2d 310).

It is, therefore, ordered that petitioner's motion to set aside and vacate the sentence imposed upon him by this Court be, and it is, hereby dismissed.

Dated: September 14, 1960.

SHERRILL HALBERT,
United States District Judge.

38 In United States District Court, Sacramento, California

Civil No. 8156

Criminal No. 12310

SEPT. 22, 1960.

CHARLES EDWARD SANDERS

v.

UNITED STATES OF AMERICA

Motion and affidavit in forma pauperis

Filed Sept. 26, 1960

[File endorsement omitted.]

¹The Court has reviewed the entire file in Crim. No. 12310, which includes the previous proceeding, and a transcript of the proceedings at the time petitioner entered his plea, and, aside from the conclusion reached on the legal propriety of the instant petition, is of the view that petitioner's complaints are without merit in fact.

Comes now Charles Edward Sanders and respectfully moves the Court for an order permitting him to proceed in appeal to the United States Court of Appeals for the Ninth Circuit in forma pauperis.

Charles Edward Sanders in support of his motion, the affiant states upon his oath that he is a pauperis person within the meaning of Section 1915(a) Title 28 U.S.C.

1. That he is of legal age.
2. That he is a citizen of the United States by birth.
3. That he takes this action in good faith, for he verily believes he has a meritorious cause.

CHARLES EDWARD SANDERS,

Box 1437.

39 In United States District Court, Sacramento,
California

Civil No. 1856

Criminal No. 12310

SEPT. 22, 1960.

CHARLES EDWARD SANDERS

v.

UNITED STATES OF AMERICA

Notice of appeal

Name and address of appellant: Charles Edward Sanders, Box No. 1437, Alcatraz, California.

Concise statement of Judgment: 15 years on plea of guilty violation of Title 18 Sec. 2113.

Order appealed from: Denial of motion filed under Section 2255, Title 28 U.S.C.

Date of order: September 14, 1960.

Name of Judge: Honorable Sherrill Halbert.

Notice is hereby given of appeal of the above designated order to the United States Court of Appeals for the Ninth Circuit.

CHARLES EDWARD SANDERS,

Box 1437.

40 In the United States District Court for the Northern District of California, Northern Division

Civil No. 8156

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Order granting motion for leave to proceed in forma pauperis

September 27, 1960

[File endorsement omitted.]

The plaintiff having filed herein a motion seeking permission to proceed with an appeal to the United States Court of Appeals for the Ninth Circuit; this Court having considered the same; and good cause appearing therefor:

It is hereby ordered that said plaintiff be, and he is, hereby granted permission and allowed to proceed in this case with an appeal to the United States Court of Appeals for the Ninth Circuit, without the pre-payment of any fees of this Court, or its officers.

Date: September 27, 1960.

SHERRILL HALBERT,
United States District Judge.

42 In the United States Court of Appeals for the Ninth Circuit

No. 17375

CHARLES EDWARD SANDERS, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT

Before: HAMLEY, HAMLIN and KOELSCH, *Circuit Judges*

Opinion, per curiam

December 14, 1961

[File endorsement omitted.]

Charles Edward Sanders appeals from a district court order denying his motion, made under 28 U.S.C.A., § 2255, to set aside and vacate a judgment of conviction and sentence on a charge of bank robbery. 18 U.S.C.A., § 2113(a). The principal point urged on appeal is that the district court erred in failing to grant appellant a hearing before acting upon his motion.

On January 19, 1959, Sanders was brought before the district court, charged with a violation of 18 U.S.C.A., § 2113(a). The charge was explained to defendant and he was told that it constituted a felony for which he could be fined or imprisoned or both. A copy of the proposed information was handed to him. The court explained to defendant that he had a right to counsel and Sanders stated that he understood that he had that right but wished to waive it. It was also explained to Sanders that he could not be proceeded against except by indictment by the grand jury, unless he waived that right. Defendant stated that he understood that he had that right but waived his right to be proceeded against by indictment and consented to be proceeded against by information.

43 In response to questioning by the court, Sanders stated that he had freely and voluntarily decided to proceed in this fashion, and that no threats or promises had been made to induce him to take such action. He signed a waiver of indictment, the charge was read to him, and he stated that he understood the charge. Sanders then entered a plea of guilty.

On February 10, 1959, Sanders was brought before the court for sentencing. Upon being asked if there was anything he wished to say before sentence was pronounced, Sanders stated that, if possible, he would like to go to Springfield or Lexington for addiction cure. "I have been using narcotics off and on for quite a while," he told the court. A fifteen year sentence was then pronounced.

Sanders did not appeal from the conviction and sentence. On January 4, 1960, however, appearing propria persona, he filed a motion under § 2255 to vacate and set aside his sentence. The grounds relied upon were that the indictment was in-

valjd, he was denied adequate assistance of counsel, and that he was intimidated and coerced into entering a plea without counsel and without any knowledge of the charges against him.

Holding that the motion contained nothing but unsupported charges which were completely refuted by the files and records, the district court, on February 3, 1960, denied the motion without hearing. Sanders did not appeal.

* Appellant, again appearing propria persona, filed the instant § 2255 motion on September 8, 1960. The single ground advanced in support of this second § 2255 motion was that:

*** * * at the time of trial and sentence the petitioner was mentally incompetent and was unable to cooperate intelligently in his defense; that his mental incompetency was

44 the result of administration of narcotic drugs during the period petitioner was held in the Sacramento County jail pending trial in the instant case."

This ground had not been advanced in Sanders' first motion. In an affidavit filed in support of the second motion, Sanders stated that "during the period of the trial" he was under the influence of a drug, and that he did not understand trial procedure owing to his mental incompetency caused by the administration of a drug.

This second motion was denied, without hearing, on September 15, 1960. Pointing out that in his second motion Sanders had given no reason why he could not and should not, have raised the issue of mental competency at the time of his first motion, the court stated that, in the exercise of its discretion it would refuse to entertain the second motion.

Sanders appealed to this court and was permitted to proceed in forma pauperis. We appointed counsel to assist him on the appeal.

It is provided in § 2255 that the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. Sanders' motion of September 8, 1960, was a second motion for "similar relief," since in both this and the earlier motion, he sought to set aside and vacate the judgment and sentence.

Whether a court should entertain a second or successive motion for similar relief is, under the provision of § 2255 re-

ferred to above, a matter resting within the sound discretion of the trial judge. *Daniels v. United States*, 9 Cir., 258 F. 2d 356.

Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion. *Moore v. United States*, D.C. Cir., 278 F. 2d 459.

Affirmed.

FREDERICK G. HAMLEY,
O. D. HAMLIN,
M. OLIVER KOELSCH,
Circuit Judges.

46 In United States Court of Appeals
for the Ninth Circuit

No. 17375

CHARLES EDWARD SANDERS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Judgment

December 14, 1961

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 14, 1961.

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 Supreme Court of the United States
No. 996 Misc., October Term, 1961.

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

*Order granting motion for leave to proceed in forma pauperis
and granting petition for writ of certiorari*

June 25, 1962

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 1062 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 25, 1962

Mr. Justice Frankfurter took no part in the consideration or decision of this motion and petition.

Office Supreme Court, U.S.

F. E. D.

DEC 20 1962

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 202

CHARLES EDWARD SANDERS,

Petitioner,

vs.

UNITED STATES.

WITNESS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

FRED M. VINSON, JR.

Counsel for Petitioner

505 Transportation Building
Washington 6, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 202

CHARLES EDWARD SANDERS,

Petitioner.

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Charles Edward Sanders, the Petitioner herein, is presently serving a fifteen year sentence for the alleged violation of the Federal Bank Robbery Act, 18 U.S.C. § 2113 (a), 18 U.S.C.A. § 2113 (a), imposed by the United States District Court for the Northern District of California, Northern Division. Petitioner filed a Motion to Vacate Sentence in said United States District Court which was denied without hearing. Upon denial, Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the decision of the District Court.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 297 F.2d 735 and is reproduced in the Transcript of Record on pages 25 through 28. The opinion of the District Court may also be seen therein, at pages 22 and 23.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 14, 1961. In the Supreme Court of the United States, the Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari was filed on February 5, 1962, and was granted on June 25, 1962. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Questions Presented

1. May the sentencing court refuse to entertain a second motion under § 2255 where the motion supplies factual grounds for relief when the basis for the denial of the first motion was its conclusory nature?
2. Where a second or successive motion under § 2255 states new grounds for relief and raises an issue appropriate for decision or collateral attack upon a sentence, may the sentencing court refuse to entertain the motion?
3. Do allegations in a § 2255 motion that movant was mentally incompetent, due to being under the influence of narcotic drugs, at the time he waived the right to counsel, waived indictment, entered a guilty plea and was sentenced, which allegations are uncontradicted in the record, require the sentencing court to hold a hearing on the motion?

Statute Involved

28 U.S.C. § 2255, 28 U.S.C.A. § 2255

§ 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTAKING SENTENCE.

- A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

Statement of the Case

On January 19, 1959, Petitioner appeared without counsel before the United States District Court for the Ninth District of California, where he was charged with taking approximately \$220 on January 16, 1959, from an office of a bank in Sacramento, California (R. 1, 2). After explanation by the Court, Petitioner waived his right to counsel (R. 2), waived indictment and consented to proceed by way of information (R. 3 and 5). The information was then filed and read (R. 3, 4 and 6) and Petitioner entered a plea of guilty (R. 4).

On February 10, 1959, Petitioner was brought before the Court for sentencing (R. 7 and 8). When asked if he wished

to say anything before judgment was pronounced, Petitioner stated, "If possible, your Honor, I would like to go to Springfield or Lexington for addiction cure. I have been using narcotics off and on for quite a while" (R. 8). The Court recommended commitment to a medical facility and sentenced Petitioner to be imprisoned for a term of fifteen years (R. 8 and 9). As a result of this sentence, Petitioner is presently confined in the federal penitentiary at Alcatraz, California.

Petitioner, appearing in proper person, filed a Motion on January 4, 1960, petitioning the sentencing court to vacate and set aside his sentence (R. 10). As grounds therefor, he made the general allegation that the "indictment" (sic) was invalid, that his constitutional rights had been violated, that he was denied adequate assistance of counsel, and that he was intimidated and coerced into entering a plea without counsel and with no knowledge of the charges lodged against him (R. 10 and 11). With this Motion, Petitioner also filed a Petition for the Writ of Habeas Corpus-ad-Testificandum and an Affidavit and Motion to Proceed in Forma-Pauperis (R. 13 and 14).

The sentencing court, by Memorandum and Order of February 3, 1960, refused to grant a hearing and denied Petitioner's Motions and Petition (R. 15-17).

Slightly more than seven months later (on September 8, 1960), the Petitioner filed in proper person, in the sentencing court, a Motion to Vacate Sentence (R. 17), a Memorandum in support thereof (R. 18-20) and an Affidavit supporting the allegations made in the Motion (R. 21). This Motion alleges that Petitioner's conviction and judgment were obtained in violation of the Constitution and laws of the United States because at the time of trial and sentence he was mentally incompetent as a result of the administration of narcotic drugs. The supporting Affidavit states

specifically that Petitioner was confined in the Sacramento County Jail from on or about January 16, 1959 until February 18, 1959; that during this period he received narcotic drugs administered by medical authorities attendant at the jail because he was a known addict; that he was under the influence of a drug during the period of the "trial"; and that he did not understand the "trial proceeding" owing to mental incompetency caused by the administration of a drug. In concluding his Memorandum, Petitioner requested the Court to hold a hearing to enable him to present evidence to sustain the Motion.

The sentencing court, by Memorandum and Order filed September 15, 1960, refused to entertain Petitioner's Motion and, without hearing, ordered it dismissed (R. 22-23).

Thereafter, in a timely manner, Petitioner noted an appeal to the United States Court of Appeals for the Ninth Circuit (R. 24) and was granted permission to appeal *in forma pauperis* (R. 25). The appellate court, evidently without argument, affirmed the order of the trial court by opinion and judgment filed December 14, 1960 (R. 25-29).

Summary of Argument

1. Petitioner's previous *pro se* Motion under § 2255 was denied without hearing, for, in the words of the sentencing court, it was "replete with conclusions" and "sets forth no facts upon which such conclusions can be founded" (R. 16). In response to the sentencing court's rationale, the Petitioner, appearing in proper person, filed a second Motion, which is now here for consideration, in which he corrected his prior error by setting forth under oath the specific facts which, if proven, entitle him to relief. Under these circumstances it is an abuse of discretion for the sentencing court to refuse to entertain the Motion in question.

2. In his Motion under § 2255, the Petitioner is entitled to a hearing where he has alleged that he was under the influence of narcotic drugs and therefore, was mentally incompetent at the time he waived the right to counsel, waived indictment, entered a guilty plea and was sentenced.

3. A sentencing court may not refuse to grant a hearing on a second motion under § 2255 where new grounds for relief are alleged and the files and records of the case do not conclusively show that the prisoner is entitled to no relief.

ARGUMENT

Under the Particular Circumstances of This Case, It Is an Abuse of Discretion to Refuse to Entertain Petitioner's Motion to Vacate Sentence

The Petitioner, appearing in proper person, first filed a § 2255 motion in the sentencing court predicated on broad constitutional grounds and supported only by legal conclusions. The sentencing court denied this motion stating that:

"Defendant's Motion, although replete with conclusions, sets forth no facts upon which conclusions can be founded. For this reason alone, this Motion may be denied without a hearing (cases cited)."

"This Motion sets forth nothing but unsupported charges, which are completely refuted by the files and records of this case" (R. 16).

Petitioner obviously benefited from the sentencing court's Memorandum, because approximately seven months later, again appearing in proper person, he filed a second motion

under § 2255 in which he corrected his former technical error by detailing specifically the grounds upon which he predicated his relief, and he buttressed this motion with an affidavit. This second motion and the affidavit supporting it allege that Petitioner received drugs administered by medical authorities at the jail in which he was incarcerated during the period in which he made court appearances and was sentenced, and that, due to the administration of said drugs, he was mentally incapacitated at the times when he waived the right to counsel, waived indictment, pled guilty and was sentenced.

These allegations, made upon a first motion under Sec. 2255 would unquestionably have entitled Petitioner to at least a hearing in a court within the Ninth Circuit. *Bell v. United States*, 269 F.2d 419 (9th Cir. 1959). Here, however, both the sentencing court and the appellate court held in essence that Petitioner's failure to include these specific grounds in his first motion justified their refusal to entertain his second motion.

This holding would be much more understandable had Petitioner been represented by counsel when presenting his first motion, or if Petitioner had been given leave to amend his first motion. Compare *Aiken v. United States*, 282 F.2d 215 (4th Cir. 1960). However, Petitioner's first motion was denied on purely technical grounds, and, when Petitioner corrected his technical errors in the form of a second motion, the sentencing court refused to entertain it on the grounds that Petitioner, unlearned in the law, was barred from a hearing on the merits because of his technical failure and omission on the first motion. Petitioner submits that the constitutional rights which may have been denied him cannot be preempted in this arbitrary fashion.

To contrast this arbitrary handling with other courts who have faced a similar situation, we cite the case of

Stephens v. United States, 246 F.2d 607 (10th Cir. 1957) where the court stated: "If the motion is denied without hearing because of insufficiency of pleading a further motion, if legally sufficient, should not be considered repetitious." See also *Plummer v. United States*, 260 F.2d 729 (D.C. Cir. 1958) where new grounds under a § 2255 motion were raised for the first time on appeal. The court there refused to consider the new grounds but stated that if there was any merit to them, they could be raised on a second motion which may be entertained under certain circumstances at the discretion of the sentencing court. It is true that the filing of a prior motion is a matter to be considered by the court in the exercise of its discretion, but that factor alone cannot be controlling, in these circumstances.

The Ninth Circuit, from which this case springs, has held, in dealing with a second or successive motion under § 2255, that: "It should not then be denied hearing solely upon the ground that it is 'a second or successive motion for similar relief' under § 2255." *Hassell v. United States*, 287 F.2d 646 (9th Cir. 1961).¹ This rule was established in *Salingar v. Loisel*, 265 U.S. 224 (1924), where the court said:

"... each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case; and (b) a prior refusal to discharge on a *like* application" (265 U.S. 231). (Emphasis supplied.)

¹ See also *Hill v. United States*, 256 F.2d 957 (6th Cir. 1958); *Hallowell v. United States*, 197 F.2d 926 (5th Cir. 1952); and *Barrett v. Hunter*, 180 F.2d 510 (10th Cir. 1950); cert. denied, 340 U.S. 897.

In *Salinger* the court quotes Mr. Justice Field with approval when he stated in *Ex Parte Cuddy* (C.C.), 40 Fed. 62:

"The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the *fullness of the consideration given to it*" (265 U.S. 224 at pages 231-2). (Emphasis added.)

**If the Sentencing Court Is to Entertain Petitioner's Motion,
It Must Grant a Hearing at Which the Issues
Here Raised Can Be Resolved**

The gravamen of Petitioner's Motion is that he was mentally incapacitated, due to government-administered drugs, at the time he waived certain constitutional rights and was sentenced. *Walker v. Johnston*, 312 U.S. 275 (1941), a habeas corpus case, holds that a hearing must be held when issues of fact involving the deprivation of a constitutional right are concerned. *United States v. Hayman*, 342 U.S. 205, 217 (1952), teaches us that, as a remedy, Sec. 2255 "is intended to be as broad as habeas corpus".

Cited in the footnote below are six cases where the courts have held that allegations of mental incapacity due to being under the influence of drugs or suffering from withdrawal symptoms at some stage in the judicial process entitled the movant to a hearing in a Sec. 2255 proceeding.²

² *Rifel v. United States*, 299 F.2d 802 (5th Cir. 1962); *Catalano v. United States*, 298 F.2d 616 (2nd Cir. 1962); *Alexander v. United States*, 290 F.2d 252 (5th Cir. 1961), cert. denied, 368 U.S. 891 (1961); *Coates v. United States*, 273 F.2d 514 (D.C. Cir. 1959), cert. denied, 366 U.S. 914 (1961); *Pledger v. United States*, 272 F.2d 69 (4th Cir. 1959); and *Lipscomb v. United States*, 209 F.2d 831 (8th Cir. 1954), cert. denied, 347 U.S. 962 (1954).

Supporting this view is *Hayes v. United States*, 305 F.2d 540 (8th Cir. 1962) where the court, at page 543, stated:

"It is hardly necessary to add that certainty as to the lack of any mental effects from drugs upon a defendant in his trial and conviction is a matter of particular judicial solicitude."

Under 28 U.S.C. § 2255, the Sentencing Court Has No Discretion to Refuse to Entertain a Second or Successive Motion Filed Under That Statute Where the Moving Party Alleges New Grounds for Relief and the Files and Records in the Case Do Not Conclusively Show That No Relief Is Justified

18 U.S.C. § 2255 reads in part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." The phrase "for similar relief" has injected some confusion in this area and in conflicting opinions from the various circuits. The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in *Smith v. United States*, 270 F.2d 921 (D.C. Cir. 1959), holds that a § 2255 motion:

"... is required to be entertained by the sentencing court when it presents ground 'not theretofore presented and determined'. This is 'new ground' which prevents the motion from being one for 'similar relief'. This is so although the ultimate relief sought may be said to be similar in the sense that the second motion, like the earlier one, seeks a new trial or vacation or correction of sentence. Such relief is not deemed similar if sought upon a dissimilar ground of collateral attack" (270 F.2d at page 925).

The rationale of the *Smith* case, *supra*, is clear and persuasive. The Supreme Court, in *Hayman*, *supra*, established that the remedy under § 2255 is as broad as habeas corpus and further stated that the history of § 2255 contains no purpose to limit or impinge prisoners' rights of collateral attack upon their convictions. The statute governing habeas corpus proceedings requires the courts to entertain applications for habeas corpus when there is presented "new ground not theretofore presented and determined" (28 U.S.C. § 2244).

In *Price v. Johnston*, 334 U.S. 266 (1948), a case involving the Great Writ, this Court limited the *Salinger* holding, and, in language which may be controlling here, stated:

"There has thus been no proper occasion prior to the fourth proceeding for a hearing and determination by the District Court as to the allegation that the prosecution knowingly used false testimony to obtain a conviction. That fact renders inapplicable *Salinger v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed. 989, upon which reliance was placed by the Circuit Court of Appeals. It was there held that, while habeas corpus proceedings are free from the res judicata principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later habeas corpus application raising the same issues is considered. But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition" (334 U.S. at page 289).

Petitioner's second Motion states "new grounds" or "new matter" in this sense, for his first motion contained no

grounds but only conclusions, and certainly raises a new issue.

Though the case of *Heflin v. United States*, 358 U.S. 415 (1959) is not in point on the facts, the doctrine enunciated therein is most important to a consideration of this case. The concurring opinion, joined in by five Justices, reaffirms the principles enunciated in *Hayman, supra*; and, with respect to the language of Section 2255 which reads "A motion for such relief may be made at any time", this opinion states:

"This latter provision simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable" (358 U.S. 420).

With these guideposts, a sentencing court cannot refuse to entertain a second or successive motion under Section 2255, if new grounds for relief are alleged, unless the files and records of the case conclusively show that the prisoner is entitled to no relief. The latter provision, a limitation contained in the statute, adequately protects the courts against frivolous motions. The files and records in this case do not conclusively show Petitioner is entitled to no relief, but, on the other hand, do show in the Transcript of Sentence (R. 8) that Petitioner was a user of narcotics, a fact which lends credibility to his allegations.

Conclusion

Petitioner seeks merely a hearing on the issues raised by this Section 2255 Motion. It is submitted that Petitioner has shown, on the record as it now appears, a deprivation of constitutional rights, as to which he is entitled to his day in court. In *Coates v. United States, supra*, the court, in

22

CHARLES EDWARD SANDERS VS. UNITED STATES

35

In the United States District Court for the Northern
District of California, Northern Division

Civil No. 8156

CHARLES EDWARD SANDERS, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

Memorandum and order

September 15, 1960

[File endorsement omitted.]

Petitioner has moved this Court to set aside and vacate the sentence pronounced against him, as the result of his conviction on a plea of guilty to the charge of violation of Title 18 U.S.C. § 2113(a) (bank robbery), in the case of United States v. Sanders, Crim. No. 12310 in the records of this Court. This relief is sought under the provisions of Title 28 U.S.C. § 2255. Petitioner alleges that he was mentally incompetent and incapable of participating intelligently at the time of his plea and sentence. He alleges that the medical authorities in the Sacramento County Jail, in which institution he was held at the time of his plea and sentence, administered 36 narcotic drugs to him from time to time, because he was a known addict, and that these drugs rendered him mentally incompetent as aforesaid.

The record shows that petitioner was sentenced on February 10, 1959. At his request, the Court recommended that he be sent to a medical facility for treatment for narcotic addiction. On January 4, 1960, petitioner filed a motion under Title 28 U.S.C. § 2255, for the same relief which he now seeks. In this latter motion, petitioner made no mention of any mental incompetency caused by narcotic drugs, although the facts (as to his having been or not been drugged as now alleged) must have been known to him at the time of that motion. Petitioner offers, in his present petition, no excuse for the failure to raise the questions, which he seeks to raise now, at the time

he filed the earlier motion. This Court carefully considered and denied on its merits petitioner's earlier motion, by a memorandum and order filed in United States v. Sanders, *supra*, on February 3, 1960.

This Court is not required to entertain a second motion for similar relief on behalf of petitioner (Title 28 U.S.C. § 2255). As there is no reason given, or apparent to this Court,¹ why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion, the Court will refuse, in the exercise of its statutory discretion, to 37 entertain the present petition (See: Daniels vs. United States, 258 F. 2d 356; Bickford vs. United States, 206 F. 2d 395; Dunn vs. United States, 234 F. 2d 219; and United States vs. Brown, 207 F. 2d 310).

It is, therefore, ordered that petitioner's motion to set aside and vacate the sentence imposed upon him by this Court be, and it is, hereby dismissed.

Dated: September 14, 1960.

SHERRILL HALBERT,
United States District Judge.

38 In United States District Court, Sacramento, California

Civil No. 8156

Criminal No. 12310

SEPT. 22, 1960.

CHARLES EDWARD SANDERS

v.
UNITED STATES OF AMERICA

Motion and affidavit in forma pauperis

Filed Sept. 26, 1960

[File endorsement omitted.]

¹ The Court has reviewed the entire file in Crim. No. 12310, which includes the previous proceeding, and a transcript of the proceedings at the time petitioner entered his plea, and, aside from the conclusion reached on the legal propriety of the instant petition, is of the view that petitioner's complaints are without merit in fact.

24 CHARLES EDWARD SANDERS VS. UNITED STATES

Comes now Charles Edward Sanders and respectfully moves the Court for an order permitting him to proceed in appeal to the United States Court of Appeals for the Ninth Circuit in forma pauperis.

Charles Edward Sanders in support of his motion, the affiant states upon his oath that he is a pauperis person within the meaning of Section 1915(a) Title 28 U.S.C.

1. That he is of legal age.
2. That he is a citizen of the United States by birth.
3. That he takes this action in good faith, for he verily believes he has a meritorious cause.

CHARLES EDWARD SANDERS,

Box 1437.

**39 In United States District Court, Sacramento,
California**

Civil No. 1856

Criminal No. 12310

SEPT. 22, 1960.

CHARLES EDWARD SANDERS

v.

UNITED STATES OF AMERICA

Notice of appeal

Name and address of appellant: Charles Edward Sanders, Box No. 1437, Alcatraz, California.

Concise statement of Judgment: 15 years on plea of guilty violation of Title 18 Sec. 2113.

Order appealed from: Denial of motion filed under Section 2255, Title 28 U.S.C.

Date of order: September 14, 1960.

Name of Judge: Honorable Sherrill Halbert.

Notice is hereby given of appeal of the above designated order to the United States Court of Appeals for the Ninth Circuit.

CHARLES EDWARD SANDERS,

Box 1437.

- 40 In the United States District Court for the Northern District of California, Northern Division

Civil No. 8156

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Order granting motion for leave to proceed in forma pauperis

September 27, 1960

[File endorsement omitted.]

The plaintiff having filed herein a motion seeking permission to proceed with an appeal to the United States Court of Appeals for the Ninth Circuit; this Court having considered the same; and good cause appearing therefor:

It is hereby ordered that said plaintiff be, and he is, hereby granted permission and allowed to proceed in this case with an appeal to the United States Court of Appeals for the Ninth Circuit, without the pre-payment of any fees of this Court, or its officers.

Date: September 27, 1960.

SHERRILL HALBERT,
United States District Judge.

- 42 In the United States Court of Appeals for the Ninth Circuit

No. 17375

CHARLES EDWARD SANDERS, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges

Opinion, per curiam

December 14, 1961

[File endorsement omitted.]

26 CHARLES EDWARD SANDERS VS. UNITED STATES

Charles Edward Sanders appeals from a district court order denying his motion, made under 28 U.S.C.A., § 2255, to set aside and vacate a judgment of conviction and sentence on a charge of bank robbery. 18 U.S.C.A., § 2113(a). The principal point urged on appeal is that the district court erred in failing to grant appellant a hearing before acting upon his motion.

On January 19, 1959, Sanders was brought before the district court, charged with a violation of 18 U.S.C.A., § 2113(a). The charge was explained to defendant and he was told that it constituted a felony for which he could be fined or imprisoned or both. A copy of the proposed information was handed to him. The court explained to defendant that he had a right to counsel and Sanders stated that he understood that he had that right but wished to waive it. It was also explained to Sanders that he could not be proceeded against except by indictment by the grand jury, unless he waived that right. Defendant stated that he understood that he had that right but waived his right to be proceeded against by indictment and consented to be proceeded against by information.

43 In response to questioning by the court, Sanders stated that he had freely and voluntarily decided to proceed in this fashion, and that no threats or promises had been made to induce him to take such action. He signed a waiver of indictment, the charge was read to him, and he stated that he understood the charge. Sanders then entered a plea of guilty.

On February 10, 1959, Sanders was brought before the court for sentencing. Upon being asked if there was anything he wished to say before sentence was pronounced, Sanders stated that, if possible, he would like to go to Springfield or Lexington for addiction cure. "I have been using narcotics off and on for quite a while," he told the court. A fifteen year sentence was then pronounced.

Sanders did not appeal from the conviction and sentence. On January 4, 1960, however, appearing propria persona, he filed a motion under § 2255 to vacate and set aside his sentence. The grounds relied upon were that the indictment was in-

valid, he was denied adequate assistance of counsel, and that he was intimidated and coerced into entering a plea without counsel and without any knowledge of the charges against him.

Holding that the motion contained nothing but unsupported charges which were completely refuted by the files and records, the district court, on February 3, 1960, denied the motion without hearing. Sanders did not appeal.

Appellant, again appearing propria persona, filed the instant § 2255 motion on September 8, 1960. The single ground advanced in support of this second § 2255 motion was that:

*** at the time of trial and sentence the petitioner was mentally incompetent and was unable to cooperate intelligently in his defense; that his mental incompetency was
44 the result of administration of narcotic drugs during the period petitioner was held in the Sacramento County jail pending trial in the instant case."

This ground had not been advanced in Sanders' first motion. In an affidavit filed in support of the second motion, Sanders stated that "during the period of the trial" he was under the influence of a drug, and that he did not understand trial procedure owing to his mental incompetency caused by the administration of a drug.

This second motion was denied, without hearing, on September 15, 1960. Pointing out that in his second motion Sanders had given no reason why he could not and should not, have raised the issue of mental competency at the time of his first motion, the court stated that, in the exercise of its discretion it would refuse to entertain the second motion.

Sanders appealed to this court and was permitted to proceed in forma pauperis. We appointed counsel to assist him on the appeal.

It is provided in § 2255 that the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. Sanders' motion of September 8, 1960, was a second motion for "similar relief," since in both this and the earlier motion, he sought to set aside and vacate the judgment and sentence.

Whether a court should entertain a second or successive motion for similar relief is, under the provision of § 2255 re-

23 CHARLES EDWARD SANDERS VS. UNITED STATES

ferred to above, a matter resting within the sound discretion of the trial judge. Daniels v. United States, 9 Cir., 258 F. 2d 356.

Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion. Moore v. United States, D.C. Cir., 278 F. 2d 459.

Affirmed.

FREDERICK G. HAMLEY,
O. D. HAMLIN,
M. OLIVE. KOELSCH,
Circuit Judges.

46 In United States Court of Appeals
for the Ninth Circuit

No. 17375

CHARLES EDWARD SANDERS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Judgment

December 14, 1961

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 14, 1961.

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 Supreme Court of the United States
No. 996 Misc., October Term, 1961

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

*Order granting motion for leave to proceed in forma pauperis
and granting petition for writ of certiorari*

June 25, 1962

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1062 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 25, 1962

Mr. Justice Frankfurter took no part in the consideration or decision of this motion and petition.

Office-Supreme Court, U.S.

UNITED

DEC 20 1962

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 202

CHARLES EDWARD SANDERS,

Petitioner,

U.S.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

FRED M. VINSON, JR.

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 202

CHARLES EDWARD SANDERS,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Charles Edward Sanders, the Petitioner herein, is presently serving a fifteen year sentence for the alleged violation of the Federal Bank Robbery Act, 18 U.S.C. § 2113 (a), 18 U.S.C.A. § 2113 (a), imposed by the United States District Court for the Northern District of California, Northern Division. Petitioner filed a Motion to Vacate Sentence in said United States District Court which was denied without hearing. Upon denial, Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the decision of the District Court.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 297 F.2d 735 and is reproduced in the Transcript of Record on pages 25 through 28. The opinion of the District Court may also be seen therein at pages 22 and 23.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 14, 1961. In the Supreme Court of the United States, the Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari was filed on February 5, 1962, and was granted on June 25, 1962. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Questions Presented

1. May the sentencing court refuse to entertain a second motion under § 2255 where the motion supplies factual grounds for relief when the basis for the denial of the first motion was its conclusory nature?
2. Where a second or successive motion under § 2255 states new grounds for relief and raises an issue appropriate for decision or collateral attack upon a sentence, may the sentencing court refuse to entertain the motion?
3. Do allegations in a § 2255 motion that movant was mentally incompetent, due to being under the influence of narcotic drugs, at the time he waived the right to counsel, waived indictment, entered a guilty plea and was sentenced, which allegations are uncontradicted in the record, require the sentencing court to hold a hearing on the motion?

Statute Involved

28 U.S.C. § 2255, 28 U.S.C.A. § 2255

2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

Statement of the Case

On January 19, 1959, Petitioner appeared without counsel before the United States District Court for the Ninth District of California, where he was charged with taking approximately \$220 on January 16, 1959, from an office of a bank in Sacramento, California (R. 1, 2). After explanation by the Court, Petitioner waived his right to counsel (R. 2), waived indictment and consented to proceed by way of information (R. 3 and 5). The information was then filed and read (R. 3, 4 and 6) and Petitioner entered a plea of guilty (R. 4).

On February 10, 1959, Petitioner was brought before the Court for sentencing (R. 7 and 8). When asked if he wished

to say anything before judgment was pronounced, Petitioner stated, "If possible, your Honor, I would like to go to Springfield or Lexington for addiction cure. I have been using narcotics off and on for quite a while" (R. 8). The Court recommended commitment to a medical facility and sentenced Petitioner to be imprisoned for a term of fifteen years (R. 8 and 9). As a result of this sentence, Petitioner is presently confined in the federal penitentiary at Alcatraz, California.

Petitioner, appearing in proper person, filed a Motion on January 4, 1960, petitioning the sentencing court to vacate and set aside his sentence (R. 10). As grounds therefor, he made the general allegation that the "indictment" (sic) was invalid, that his constitutional rights had been violated, that he was denied adequate assistance of counsel, and that he was intimidated and coerced into entering a plea without counsel and with no knowledge of the charges lodged against him (R. 10 and 11). With this Motion, Petitioner also filed a Petition for the Writ of Habeas Corpus-ad-Testificandum and an Affidavit and Motion to Proceed in Ferra-Pauperis (R. 13 and 14).

The sentencing court, by Memorandum and Order of February 3, 1960, refused to grant a hearing and denied Petitioner's Motions and Petition (R. 15-17).

Slightly more than seven months later (on September 8, 1960), the Petitioner filed in proper person, in the sentencing court, a Motion to Vacate Sentence (R. 17), a Memorandum in support thereof (R. 18-20) and an Affidavit supporting the allegations made in the Motion (R. 21). This Motion alleges that Petitioner's conviction and judgment were obtained in violation of the Constitution and laws of the United States because at the time of trial and sentence he was mentally incompetent as a result of the administration of narcotic drugs. The supporting Affidavit states

specifically that Petitioner was confined in the Sacramento County Jail from on or about January 16, 1959 until February 18, 1959; that during this period he received narcotic drugs administered by medical authorities attendant at the jail because he was a known addict; that he was under the influence of a drug during the period of the "trial"; and that he did not understand the "trial proceeding" owing to ~~mental incompetency caused by the administration of a drug.~~ In concluding his Memorandum, Petitioner requested the Court to hold a hearing to enable him to present evidence to sustain the Motion.

The sentencing court, by Memorandum and Order filed September 15, 1960, refused to entertain Petitioner's Motion and, without hearing, ordered it dismissed (R. 22-23).

Thereafter, in a timely manner, Petitioner noted an appeal to the United States Court of Appeals for the Ninth Circuit (R. 24) and was granted permission to appeal *in forma pauperis* (R. 25). The appellate court, evidently without argument, affirmed the order of the trial court by opinion and judgment filed December 14, 1960 (R. 25-29).

Summary of Argument

1. Petitioner's previous *pro se* Motion under § 2255 was denied without hearing, for, in the words of the sentencing court, it was "replete with conclusions" and "sets forth no facts upon which such conclusions can be founded" (R. 16). In response to the sentencing court's rationale, the Petitioner, appearing in proper person, filed a second Motion, which is now here for consideration, in which he corrected his prior error by setting forth under oath the specific facts which, if proven, entitle him to relief. Under these circumstances it is an abuse of discretion for the sentencing court to refuse to entertain the Motion in question.

2. In his Motion under § 2255, the Petitioner is entitled to a hearing where he has alleged that he was under the influence of narcotic drugs and therefore, was mentally incompetent at the time he waived the right to counsel, waived indictment, entered a guilty plea and was sentenced.

3. A sentencing court may not refuse to grant a hearing on a second motion under § 2255 where new grounds for relief are alleged and the files and records of the case do not conclusively show that the prisoner is entitled to no relief.

ARGUMENT

Under the Particular Circumstances of This Case, It Is an Abuse of Discretion to Refuse to Entertain Petitioner's Motion to Vacate Sentence

The Petitioner, appearing in proper person, first filed a § 2255 motion in the sentencing court predicated on broad constitutional grounds and supported only by legal conclusions. The sentencing court denied this motion stating that:

"Defendant's Motion, although replete with conclusions, sets forth no facts upon which conclusions can be founded. For this reason alone, this Motion may be denied without a hearing (cases cited)."

"This Motion sets forth nothing but unsupported charges, which are completely refuted by the files and records of this case" (R. 16).

Petitioner obviously benefited from the sentencing court's Memorandum, because approximately seven months later, again appearing in proper person, he filed a second motion

under § 2255 in which he corrected his former technical error by detailing specifically the grounds upon which he predicated his relief, and he buttressed this motion with an affidavit. This second motion and the affidavit supporting it allege that Petitioner received drugs administered by medical authorities at the jail in which he was incarcerated during the period in which he made court appearances and was sentenced, and that, due to the administration of said drugs, he was mentally incapacitated at the times when he waived the right to counsel, waived indictment, pled guilty and was sentenced.

These allegations, made upon a first motion under Sec. 2255 would unquestionably have entitled Petitioner to at least a hearing in a court within the Ninth Circuit. *Ball v. United States*, 269 F.2d 419 (9th Cir. 1959). Here, however, both the sentencing court and the appellate court held in essence that Petitioner's failure to include these specific grounds in his first motion justified their refusal to entertain his second motion.

This holding would be much more understandable had Petitioner been represented by counsel when presenting his first motion, or if Petitioner had been given leave to amend his first motion. Compare *Aiken v. United States*, 282 F.2d 215 (4th Cir. 1960). However, Petitioner's first motion was denied on purely technical grounds, and, when Petitioner corrected his technical errors in the form of a second motion, the sentencing court refused to entertain it on the grounds that Petitioner, unlearned in the law, was barred from a hearing on the merits because of his technical failure and omission on the first motion. Petitioner submits that the constitutional rights which may have been denied him cannot be preempted in this arbitrary fashion.

To contrast this arbitrary handling with other courts who have faced a similar situation, we cite the case of

Stephens v. United States, 246 F.2d 607 (10th Cir. 1957) where the court stated: "If the motion is denied without hearing because of insufficiency of pleading a further motion, if legally sufficient, should not be considered repetitions." See also *Plummer v. United States*, 260 F.2d 729 (D.C. Cir. 1958) where new grounds under a § 2255 motion were raised for the first time on appeal. The court there refused to consider the new grounds but stated that if there was any merit to them, they could be raised on a second motion which may be entertained under certain circumstances at the discretion of the sentencing court. It is true that the filing of a prior motion is a matter to be considered by the court in the exercise of its discretion, but that factor alone cannot be controlling, in these circumstances.

The Ninth Circuit, from which this case springs, has held, in dealing with a second or successive motion under § 2255, that: "It should not then be denied hearing solely upon the ground that it is 'a second or successive motion for similar relief' under § 2255." *Hassell v. United States*, 287 F.2d 646 (9th Cir. 1960).¹ This rule was established in *Salinger v. Loisel*, 265 U.S. 224 (1924), where the court said:

". . . each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case; and (b) a prior refusal to discharge on a *like* application" (265 U.S. 231). (Emphasis supplied.)

¹ See also *Hill v. United States*, 256 F.2d 957 (6th Cir. 1958); *Hallowell v. United States*, 197 F.2d 7926 (5th Cir. 1952); and *Barrett v. Hunter*, 180 F.2d 510 (10th Cir. 1950), cert. denied, 340 U.S. 897.

In *Salinger* the court quotes Mr. Justice Field with approval when he stated in *Ex Parte Cuddy* (C.C.), 40 Fed. 62:

"The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it" (265 U.S. 224 at pages 231-2). (Emphasis added.)

**If the Sentencing Court Is to Entertain Petitioner's Motion,
It Must Grant a Hearing at Which the Issues
Here Raised Can Be Resolved**

The gravamen of Petitioner's Motion is that he was mentally incapacitated, due to government-administered drugs, at the time he waived certain constitutional rights and was sentenced. *Walker v. Johnston*, 312 U.S. 275 (1941), a habeas corpus case, holds that a hearing must be held when issues of fact involving the deprivation of a constitutional right are concerned. *United States v. Hayman*, 342 U.S. 205, 217 (1952), teaches us that, as a remedy, Sec. 2255 "is intended to be as broad as habeas corpus".

Cited in the footnote below are six cases where the courts have held that allegations of mental incapacity due to being under the influence of drugs or suffering from withdrawal symptoms at some stage in the judicial process entitled the movant to a hearing in a Sec. 2255 proceeding.²

² *Riffel v. United States*, 299 F.2d 802 (5th Cir. 1962); *Catalano v. United States*, 298 F.2d 616 (2nd Cir. 1962); *Alexander v. United States*, 290 F.2d 252 (5th Cir. 1961), cert. denied, 368 U.S. 891 (1961); *Coates v. United States*, 273 F.2d 514 (D.C. Cir. 1959), cert. denied, 366 U.S. 914 (1961); *Pledger v. United States*, 272 F.2d 69 (4th Cir. 1959); and *Lipscomb v. United States*, 209 F.2d 831 (8th Cir. 1954), cert. denied, 347 U.S. 962 (1954).

Supporting this view is *Hayes v. United States*, 305 F.2d 540 (8th Cir. 1962) where the court, at page 543, stated:

"It is hardly necessary to add that certainty as to the lack of any mental effects from drugs upon a defendant in his trial and conviction is a matter of particular judicial solicitude."

- Under 28 U.S.C. § 2255, the Sentencing Court Has No Discretion to Refuse to Entertain a Second or Successive Motion Filed Under That Statute Where the Moving Party Alleges New Grounds for Relief and the Files and Records in the Case Do Not Conclusively Show That No Relief Is Justified

18 U.S.C. § 2255 reads in part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." The phrase "for similar relief" has injected some confusion in this area and in conflicting opinions from the various circuits. The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in *Smith v. United States*, 270 F.2d 921 (D.C. Cir. 1959), holds that a § 2255 motion:

"... is required to be entertained by the sentencing court when it presents ground 'not theretofore presented and determined'. This is 'new ground' which prevents the motion from being one for 'similar relief'. This is so although the ultimate relief sought may be said to be similar in the sense that the second motion, like the earlier one, seeks a new trial or vacation or correction of sentence. Such relief is not deemed similar if sought upon a dissimilar ground of collateral attack" (270 F.2d at page 925).

The rationale of the *Smith* case, *supra*, is clear and persuasive. The Supreme Court, in *Hayman*, *supra*, established that the remedy under § 2255 is as broad as habeas corpus and further stated that the history of § 2255 contains no purpose to limit or impinge prisoners' rights of collateral attack upon their convictions. The statute governing habeas corpus proceedings requires the courts to entertain applications for habeas corpus when there is presented "new ground not theretofore presented and determined" (28 U.S.C. § 2244).

In *Price v. Johnston*, 334 U.S. 266 (1948), a case involving the Great Writ, this Court limited the *Salinger* holding, and, in language which may be controlling here, stated:

"There has thus been no proper occasion prior to the fourth proceeding for a hearing and determination by the District Court as to the allegation that the prosecution knowingly used false testimony to obtain a conviction. That fact renders inapplicable *Salinger v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed. 989, upon which reliance was placed by the Circuit Court of Appeals. It was there held that, while habeas corpus proceedings are free from the res judicata principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later habeas corpus application raising the same issues is considered. But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition" (334 U.S. at page 289).

Petitioner's second Motion states "new grounds" or "new matter" in this sense, for his first motion contained no

grounds but only conclusions, and certainly raises a new issue.

Though the case of *Heflin v. United States*, 358 U.S. 415 (1959) is not in point on the facts, the doctrine enunciated therein is most important to a consideration of this case. The concurring opinion, joined in by five Justices, reaffirms the principles enunciated in *Hayman, supra*; and, with respect to the language of Section 2255 which reads "A motion for such relief may be made at any time", this opinion states:

"This latter provision simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable" (358 U.S. 420).

With these guideposts, a sentencing court cannot refuse to entertain a second or successive motion under Section 2255, if new grounds for relief are alleged, unless the files and records of the case conclusively show that the prisoner is entitled to no relief. The latter provision, a limitation contained in the statute, adequately protects the courts against frivolous motions. The files and records in this case do not conclusively show Petitioner is entitled to no relief, but, on the other hand, do show in the Transcript of Sentence (R. 8) that Petitioner was a user of narcotics, a fact which lends credibility to his allegations.

Conclusion

Petitioner seeks merely a hearing on the issues raised by this Section 2255 Motion. It is submitted that Petitioner has shown, on the record as it now appears, a deprivation of constitutional rights, as to which he is entitled to his day in court. In *Coates v. United States, supra*, the court, in

reversing and remanding for a hearing under Section 2255, stated:

"The plain fact is that a thirty minute hearing on the allegations of the motion might have cleared up all misapprehension . . . If the appellant failed to show that the plea had not been validly and competently made, that would have ended the matter, for the appellant would have been entitled to no relief. On the other hand, if not validly and competently made, the government was not entitled to the plea" (273 F.2d at page 516).

It is respectfully submitted that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and, upon remand, the sentencing court should be directed to hold a hearing at which Petitioner will be given the opportunity of meeting the burden of proving his allegations.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 202

CHARLES EDWARD SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 25-28) is reported at 297 F. 2d 735. The opinions of the district court in this proceeding (R. 22-23) and on petitioner's first motion to vacate sentence (R. 15-17) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1961 (R. 28-29). The petition for a writ of certiorari was filed on February 5, 1962 and was granted on June 25, 1962 (R. 29; 370 U.S. 936). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner's first motion under 28 U.S.C. 2255, which alleged that his plea of guilty had been entered involuntarily, without assistance of counsel and without knowledge of the charge, due to intimidation and coercion, had been denied by the district court on the basis of the files and records, which included a transcript of the arraignment. In his second motion, petitioner alleged that his plea was made without understanding in that drugs had been administered to him in jail to treat his narcotic addiction. Petitioner made no attempt to explain his failure to present this contention in his former motion.

The question presented is whether, in light of the files and records before the district court and the absence of explanation for petitioner's failure to raise the point earlier, his second motion could properly be denied as a successive motion for similar relief.

STATUTE INVOLVED

Section 2255 of Title 28, United States Code, provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced

him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

THE ARRAIGNMENT

On Friday, January 16, 1959, at a hearing before a United States Commissioner on a charge that he had robbed a San Francisco bank earlier that day, petitioner stated that he wished to waive indictment. On Monday, January 19, 1959, he appeared before the United States District Court for the Northern District of California without an attorney. The Assistant United States Attorney informed the court that petitioner had told the United States Commissioner that he desired to waive indictment. A copy of the proposed information was then given to petitioner (R. 1). It charged that on January 16, 1959, petitioner robbed Frances C. Cullen of \$220 belonging to the Crocker-Angelo National Bank, Sacramento, California, a federally insured bank (R. 6-7). The judge explained the charge to petitioner and informed him that he had a right to have an attorney at all stages of the proceedings to advise and represent him and that, if he desired an attorney, the court would obtain one for him (R. 1-2). The court further explained that petitioner could proceed without an attorney if he desired, provided he understood his right to counsel and expressly waived it. The court then asked petitioner to express his desires as to the services of an attorney. Petitioner stated that he did not want an

attorney. In response to further questions, he acknowledged that he understood his right to an attorney and that he was waiving that right (R. 2). The court also explained the right to grand jury indictment, advising petitioner that if he thought himself innocent, he should have the matter heard by the grand jury to determine whether he should even be required to stand trial (R. 2). The court then asked the following questions (R. 3):

Having in mind all that I have told you do you wish to have the matter heard by the grand jury?

The DEFENDANT. No, your Honor, I waive it.
The COURT. I didn't hear that.

The DEFENDANT. I waive that right.

The COURT. You waive that right?

The DEFENDANT. Yes.

The COURT. You understand you do have the right, though?

The DEFENDANT. Yes.

The COURT. And you now want to proceed without indictment and by way of information?

The DEFENDANT. Yes.

In response to further questions by the court, petitioner said that he freely and voluntarily, of his own free will and wish, preferred to proceed in this fashion, and that no threats or promises had been made to induce him to take such action (R. 3). Petitioner then signed a waiver of indictment (R. 3, 5). After the clerk read the information, petitioner stated that he understood the charge and was ready to enter his plea (R. 3-4). When asked if his plea was guilty or not guilty, petitioner responded guilty. The court re-

ferred the matter to the probation officer for his consideration and report (R. 4). The case was then continued (R. 5).

About three weeks later, on February 10, 1959, after two additional continuances, petitioner was again brought before the court (R. 5, 7). After recapitulating the occurrences at arraignment, the court advised petitioner that the purpose of the proceeding was to consider probation and to pronounce judgment. The probation officer advised the court that he had nothing to add to his report. The court asked petitioner if he wished to make a statement before judgment was pronounced (R. 7). The following then ensued (R. 8):

Mr. SANDERS. If possible, your Honor, I would like to go to Springfield or Lexington for addiction cure. I have been using narcotics off and on for quite a while.

The COURT. Well, I am willing to recommend that. Of course, it is up to the Attorney General what is done in that regard. But I suggest that it be noted that this man has indicated that he has had difficulty with narcotics and he desires to be treated, and I think that it is not only humane but proper and just under the circumstances.

The court then sentenced petitioner to fifteen years imprisonment, recommending commitment to a medical facility for treatment (R. 8-9).¹

¹ Petitioner was sent to the United States Penitentiary at McNeil Island, Washington. In October 1959, petitioner requested a transfer to the Penitentiary at Alcatraz, California. The request was granted and he was transferred to Alcatraz on January 12, 1960.

THE FIRST MOTION TO VACATE SENTENCE

Almost a year later, on January 4, 1960, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255 from McNeil Island Penitentiary in which (1) he challenged the validity of the "indictment", (2) claimed denial of adequate assistance of counsel, and (3) contended that the court had allowed him "to be intimidated and coerced into entering a plea without Counsel, and any knowledge of the charges lodged against" him (R. 10-11). He also argued that there had been no adequate investigation of the facts (R. 12). In connection with this motion, petitioner filed a petition for a writ of habeas corpus *ad testificandum* (R. 13-14). On February 3, 1960, the trial judge, in a memorandum, denied the motion and petition without a hearing. The court, while noting that the motion was subject to denial because of its conclusory allegations, detailed what the files and records revealed concerning the voluntariness of petitioner's action. It specifically held that his unsupported charges were conclusively and completely refuted by the files and records of the case (R. 15-17). Petitioner did not appeal.

THE SECOND MOTION TO VACATE SENTENCE

The instant proceeding was initiated by a motion to vacate sentence filed on September 8, 1960, from Alcatraz Penitentiary. This motion alleged that "at the time of trial and sentence the petitioner was mentally incompetent and was unable to cooperate intelligently in his defense; that his mental incompetency was the result of administration of narcotic drug during the

period petitioner was held in the Sacramento County Jail pending trial in the instant case" (R. 17). In a supporting affidavit, petitioner asserted that, while confined in the Sacramento County Jail from about January 17, 1959, until February 18, 1959, he was intermittently under the influence of a drug given to him by the jail medical authorities because he was a known drug addict; that during "the period of the trial" he did not understand the proceedings owing to mental incompetency caused by the administration of drugs (R. 21). A memorandum filed in support of the motion contended that the allegation that petitioner was mentally incompetent at the time of trial presented a factual issue requiring a hearing at which petitioner could "have his day in court on this issue" (R. 18-20).²

On September 15, 1960, the sentencing court denied petitioner's motion without a hearing. In its opinion, the district court recalled that he had recommended, at petitioner's request, that he be sent to a medical facility for treatment for narcotic addiction; that petitioner's first motion did not mention any mental incompetency caused by narcotic drugs although such facts, if true, must have been known at that time; that petitioner offered no excuse for failing to raise the question on his first motion; and that the court had carefully considered and denied that motion on its

² Except for the dates, the place of confinement and the purpose of the medical treatment, petitioner's motion, affidavit and memorandum are identical to those filed earlier by another prisoner at Alcatraz. See record in *Baker v. United States*, No. 494 Misc., this Term.

merits. The court observed that the statute did not require it to entertain a second motion for similar relief, and that no reason was given or apparent as to why petitioner did not raise the issue of mental incompetency on the first occasion. It therefore refused in its discretion to entertain the motion. In a footnote, the court gave as an alternative ground for decision that it "has reviewed the entire file in Criminal No. 12310, which includes the previous proceeding, and a transcript of the proceedings at the time petitioner entered his plea, and, aside from the conclusion reached on the legal propriety of the instant petition, it is of the view that petitioner's complaints are without merit in fact" (R. 23).

The court of appeals affirmed the order of the district court, holding (R. 28) :

Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion. * * *

SUMMARY OF ARGUMENT

I

The failure to utilize an earlier opportunity to rectify errors in a criminal judgment significantly increases the likelihood that there is no real basis for a later claim that a judgment was not fairly entered.

For example, if a prisoner has once unsuccessfully attacked a guilty plea collaterally on the ground of physical coercion, a later motion made on the basis of previously unmentioned threats or promises must be viewed with considerable suspicion. Because of this evidentiary consideration and in order to deter abuses of the writ of habeas corpus, this Court held, prior to the enactment of Section 2255 in 1948, that a court, in ruling on a successive application for habeas corpus, might give substantial weight to the lack of an adequate explanation for the prisoner's failure to raise the point in an earlier application.

For similar reasons Title 28, U.S. Code, Section 2255 grants the district courts power to deny successive motions on the basis of the entire record before the court, including the record of denial of an earlier motion for similar relief under the same statute. This statutory grant of discretion in dealing with successive motions, like the power to deny a hearing when the files and records show that the prisoner is entitled to no relief, is justified by three major considerations: the importance of protecting the efficacy of the collateral remedy from dilution by large numbers of frivolous motions; the costs and difficulties of transporting prisoners to and from the sentencing court; and the burden on sentencing courts of affording an evidentiary hearing to every untried factual claim, no matter how palpably untrue or how completely the prisoner's rights have been protected at trial or on prior motions.

The legislative history of 28 U.S.C. 2255 and of a companion habeas corpus provision, 28 U.S.C. 2244, both enacted in 1948, shows plainly that Congress did not intend to grant prisoners an absolute right to hear-

ings on successive motions in cases involving neither newly discovered facts nor a change of law. Instead of imposing a fixed time limitation upon applications for collateral relief—a course which might have produced harsh consequences in some cases—Congress relied upon the sentencing court to exercise an informed discretion in determining whether to entertain a second or successive motion to vacate sentence.

II

In this case, the sentencing court properly denied petitioner's second motion for collateral relief in light of the record and files before it, including, not least of all, petitioner's failure to raise, in his earlier motion under Section 2255, his present claim that his plea of guilty was vitiated by incompetency. The record of the trial, which took place before the same district judge who passed upon both Section 2255 motions, shows that the trial judge took exceptional care to assure himself that petitioner was pleading guilty voluntarily, with full knowledge of the charge and of all of his procedural rights. The record, moreover, indicates affirmatively that petitioner was aware and alert at this proceeding.

Petitioner's first motion, which claimed that he had been coerced into pleading guilty, was denied on the merits by the sentencing judge a year after conviction. On the basis of the records and files before it, the court found that petitioner had "freely and voluntarily of [his] own will and wish" waived indictment and counsel and entered a guilty plea.

Petitioner's second motion under Section 2255, although also contending that his guilty plea was not

voluntary, asserted different and inconsistent grounds. While the first motion presupposed an awareness of the proceedings and charged that illegal pressure was deliberately used to obtain a guilty plea, the second motion asserted an unawareness of the proceedings but did not claim coercion.

Thus, in denying petitioner's motion, the sentencing court had before it (1) a record showing exceptional care by the trial judge in receiving the plea of guilty; (2) a former motion showing an awareness by petitioner that there was a remedy for a plea of guilty involuntarily entered and an earlier attempt to invoke that remedy without even a mention of incompetence caused by the use of drugs; and (3) evidence that the earlier motion had been denied on the ground that its allegations were affirmatively contradicted by the record. In light of these circumstances, the petitioner's allegations were too highly implausible to justify renewed litigation over the voluntariness of a plea already twice found voluntary, and the sentencing court was well within its discretion in declining "to entertain a second *** motion for similar relief on behalf of the same prisoner."

ARGUMENT

I

SECTION 2255 GRANTS THE DISTRICT COURT DISCRETION TO DENY SUCCESSIVE MOTIONS ON THE BASIS OF THE FILES AND RECORDS IN THE CASE, INCLUDING THE HISTORY OF ANY PRIOR MOTION FOR SIMILAR RELIEF

Section 2255 of Title 28 provides that the district court may refuse to entertain a motion to vacate, set

aside, or correct a prisoner's sentence when the motion itself states no grounds for relief or the files and records show that the prisoner is entitled to no relief. It also provides that the sentencing court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner". In the present case, the district court denied petitioner's second motion under Section 2255 both on the ground that the motion was "a second or successive motion for similar relief on behalf of the same prisoner" and because the files and records of the case conclusively show that the prisoner is entitled to no relief. We submit that the district court was correct in its reliance on both grounds. Indeed, in cases such as this the facts of record and the history of prior collateral attacks upon the conviction should be considered in relationship to each other, for both involve similar statutory policies. Before considering the particulars of this case, we undertake to examine these policies.

A. SIGNIFICANT POLICY CONSIDERATIONS DICTATE THAT THE SENTENCING COURTS HAVE POWER TO DENY A PLAINLY INSUBSTANTIAL CLAIM ASSERTED ON COLLATERAL ATTACK OF A CONVICTION

There is a very high probability that even an uninformed prisoner will, in his first collateral attack on his conviction, raise all substantial factual arguments for believing that his conviction was unfairly obtained. And once a prisoner has attacked his conviction upon the ground of governmental overreaching, alleging one set of facts, any repetition of substantially the same claim upon a new set of factual allegations, which must have been known to the pris-

oner during the first proceeding, is necessarily suspect. It is this evidentiary relevance of an earlier failure to raise factual attacks on a conviction which, in large part, explains both this Court's pre-1948 decisions giving weight to an earlier failure to raise a ground for relief and the provision of Section 2255, enacted in 1948, empowering the district court to refuse in appropriate circumstances to entertain "a second or successive motion for similar relief."

Thus this provision of Section 2255 is closely related in purpose to the clause empowering the district courts to decline to entertain any motion where "the files and records of the case conclusively show that the prisoner is entitled to no relief." Both provisions reflect a considered determination that an evidentiary hearing should not be required where it is clear from the entire record before the sentencing court that the prisoner's allegations are wholly insubstantial. Congress and this Court both recognized that significant policy considerations outweigh the desirability of granting every prisoner an absolute right to an evidentiary hearing on every newly made factual allegation, no matter how implausible in light of the entire record before the sentencing court.

Three basic considerations have dictated that the district courts must have power to deny an evidentiary hearing on collateral attack where, as we shall later show in this case, it is plain that the prisoner's allegations are frivolous in light of the record. Of primary importance is the fact that if, time after time, a prisoner is to be brought before the courts for hearings on issues of fact which turn out to be without merit, the final result cannot fail to be that judges

will tend to view motions by all prisoners with a degree of skepticism that will in the end redound to the detriment of the persons for whom the remedy under 28 U.S.C. 2255 was designed. As Mr. Justice Jackson said in *Brown v. Allen*, 344 U.S. 443, 537 (concurring opinion): "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

Secondly, it is costly and burdensome to take a prisoner from a federal penitentiary to the sentencing court for an evidentiary hearing on a patently insubstantial factual allegation. There are at present over 8,000 prisoners serving terms of five years or more. Hundreds of these prisoners file Section 2255 motions each year.³ By far the greater part of these are wholly without merit and many are plainly grounded upon fabrication. Claims similar to petitioner's provide a ready example. This Term, this Court itself has had before it five cases, four from Alcatraz and one from Leavenworth, where petitioners, confined before conviction in different jails, have made allegations similar to those made by petitioner, i.e., that they were mentally incompetent because of drugs administered to them before or during the proceedings leading to

³ According to the reports of the Administrative Office of the United States Courts, 538 proceedings under 28 U.S.C. 2255 were commenced in 1960 and 560 in 1961. Annual Report of the Director, 1960, p. 231; *id.*, 1961, p. 239. Even these figures do not, however, appear to be complete in light of the Department's experience with petitions for writs of certiorari in this Court.

their conviction.⁴ Numerous similar cases involving prisoners in Alcatraz and other penitentiaries have been before the courts of appeals.⁵ Repeatedly transporting prisoners back and forth for post-conviction hearings before the sentencing court can become a serious problem in prison administration.

Finally, there is the burden upon the district courts of hearing insubstantial and repetitive claims—a burden which must be considered in light of the full protections which (as the record may reveal to the sentencing court) were granted the prisoner at trial. For example, in the case of a guilty plea, Rule 11, F.R. Crim. P., imposes on federal courts, before the plea is accepted, the duty of making certain that it is voluntarily entered with understanding of the nature of the charge. Even where, as in some cases, the record of arraignment does not show as full an inquiry by the trial court as took place in this case, and as might seem desirable to an appellate court, this does not necessarily reflect a failure of the judge to discharge that duty. There may often be unspoken

⁴ See *Boyes v. United States*, No. 59 Misc.; *Malone v. United States*, No. 55 Misc., certiorari denied, 371 U.S. 863; *Burrow v. United States*, No. 277 Misc.; *Sprenz v. United States*, No. 279 Misc.; and *Baker v. United States*, No. 494 Misc.

⁵ *Catalano v. United States*, 298 F. 2d 616 (C.A. 2); *Pledger v. United States*, 272 F. 2d 69, 301 F. 2d 906 (C.A. 4); *United States v. McNicholas*, 192 F. Supp. 717 (D. Md.), affirmed, 298 F. 2d 914 (C.A. 4), certiorari denied, 369 U.S. 878; *Alexander v. United States*, 290 F. 2d 252 (C.A. 5); *Riffle v. United States*, 299 F. 2d 802 (C.A. 5); *Juelich v. United States*, 300 F. 2d 381 (C.A. 5); *Scott v. United States*, 292 F. 2d 49 (C.A. 6), certiorari denied, 368 U.S. 879; *Hayes v. United States*, 305 F. 2d 540 (C.A. 8); *Johnston v. United States*, 292 F. 2d 51 (C.A. 10), certiorari denied, 368 U.S. 906. See also *O'Brien v. United States*, No. 20280, E.D. Pa.

assumptions in the case which are not reflected in the record. For example, the sentencing court may be well aware that the particular attorney who represented the defendant is the kind of defense counsel who would not have permitted a client to plead guilty unless he was convinced that no defense was possible. Although this fact would not be reflected in the record, the court would naturally require a greater showing before believing that a plea of guilty in such a case might have been uninformed or involuntary. Moreover, increasingly in the federal courts, particularly in cases involving guilty pleas, judges are avail-ing themselves of pre-sentence reports before fixing sentences. Investigations by trained probation officers tend to uncover latent problems, such as incompetency, which might have escaped the attention of the judge, prosecutor, or defense counsel when the plea was accepted.

These three considerations—the need to give pains-taking consideration to motions which appear meritorious, the administrative burdens involved in trans-porting large numbers of prisoners each year, and the threatened drain upon the time and energy of district judges—require a procedure by which district courts can deny hearings to motions which are so implausible in light of the record before the trial court and the prisoner's record of prior motions as to indicate that denial will leave no significant likelihood of injustice. It is no answer to frivolous applications to say that prisoners filing false affidavits could be prosecuted criminally. Prosecutions for false swearing or perjury are notoriously difficult. Moreover, a prisoner with a grievance should have a right to complain without fear of

additional punishment. The short of it is that control of the volume of hearings on insubstantial factual allegations under 28 U.S.C. 2255 necessarily depends upon the sentencing court's effective exercise of the power to deny a hearing when, in the language of the statute, "the files and records of the case conclusively show that the prisoner is entitled to no relief" or the motion is "a second or successive motion for similar relief on behalf of the same prisoner."

We do not suggest that these three considerations alone, without consideration of the substantiality of the prisoner's claim, could justify denial of a motion under Section 2255. But they do justify granting the district courts power to consider whether such a motion is in fact frivolous in light of the record and previous motions before granting an evidentiary hearing. The fact that a prisoner has previously filed other motions under Section 2255 without the barest mention of the grounds for release relied upon in a later motion has obvious relevance to the substantiality of his allegations. For example, if a prisoner has once unsuccessfully attacked a guilty plea on the ground of physical coercion, a later motion made on the basis of previously unmentioned threats or promises must be viewed with considerable suspicion. Because of this and in order to deter abuses of the writ of habeas corpus, this Court held, prior to the enactment of Section 2255 in 1948, that, though the doctrine of *res judicata* was inapplicable to habeas corpus, a court in ruling on a second application for identical relief could give controlling weight to a prior denial of habeas corpus (*Salinger v. Loisel*, 265 U.S. 224) and, in certain circumstances, must give the prior

denial such weight although the precise issue raised in the second application had not been previously determined (*Wong Doo v. United States*, 265 U.S. 239). While in *Waley v. Johnston*, 316 U.S. 101, the Court held that an application should not be denied as successive where the first was denied for insufficiency on its face, the permissibility of denying a successive application for habeas corpus where there was no excuse for failure to raise the point in an earlier application was reaffirmed in *Price v. Johnston*, 334 U.S. 266.

B. THE LEGISLATIVE HISTORY OF SECTION 2255 ESTABLISHES THAT SENTENCING COURTS WERE GRANTED DISCRETION IN DECIDING WHETHER TO ENTERTAIN A SUCCESSIVE MOTION TO VACATE SENTENCE

It was against this background that Congress enacted Section 2255 in 1948. As passed, Section 2255 broadly provides that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Its history confirms what the language indicates: That Congress proposed to confer upon the district courts broad discretion to entertain only those successive applications which are justified by either a convincing suggestion of truth or an explanation of the failure to raise the ground for relief in an earlier application.

Section 2255 came into being in 1948 in the revised Judicial Code as a part of the new habeas corpus chapter (chapter 153) enacted upon the recommendation of the Judicial Conference of the United States. At the same time, Section 2244, a related provision for habeas corpus, was adopted. The committee appointed by the Judicial Conference to study habeas corpus procedure prepared a draft of two bills, a

"procedural bill" for habeas corpus applications from which Section 2244 was derived and a "jurisdictional bill" from which Section 2255 was derived.

1. Section 1 of the procedural bill provided as follows (H.R. 4232 and S. 1452, 79th Cong., 1st Sess.):

That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. * * *

That the bill was intended to deny any claim to have successive applications entertained as a matter of right except where there were grounds for relief which not only had not been "theretofore presented," but which were also "new" because they had been unavailable at the time of the earlier application, is clear from a memorandum explaining the bill to the House and Senate Judiciary Committees. This memorandum,

written by Circuit Judge Stone and approved by Chief Justice Stone, explained Section 1 of the procedural bill as follows (emphasis added):

Section 1. This section is intended to accomplish four things: (1) to prevent "shopping around" from court to court and from judge to judge, or repeated petitions (on the same grounds) to the same court or judge; (2) *to compel petitioner to state in his petition all of the grounds for the writ then known to him;* (3) *to afford unlimited opportunity to present any grounds which petitioner may thereafter discover at any time;* (4) to afford unlimited opportunity to apply for rehearing even upon petitions theretofore presented.

As to the first purpose, the necessity therefor has been sufficiently outlined hereinbefore. * * *

The second purpose is self-explanatory and would seem to require no elaboration. Also see Wong Doo v. United States, 265 U.S. 239, 241 (1924).

The third purpose is brought about by allowing presentation of a subsequent petition based upon "new" grounds "not theretofore presented and determined."

The fourth purpose is accomplished by allowing a "rehearing", without time limit, for presentation not only of any fact situation discovered after the first trial or any subsequent applicable change in law (statutory or decision) which might have affected the first determination; but also any grounds presented by the first petition.

Thus, the fullest rights of the prisoner are

preserved and, at the same time, repetitious petitions and hearings are lessened.⁶

The September 1947 session of the Conference suggested changes in Section 2244 which Congress adopted. The provision as finally enacted retained the earlier term, "new ground not theretofore presented and determined," and provided:

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petitions present no new ground not theretofore presented and determined and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

S. Rep. 1559, 80th Cong., 2d Sess., p. 9, explained the change as follows:

The amendment to section 2244 is proposed by the Judicial Conference of Senior Circuit Judges. The original language of the section denies to Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application for such a writ,

⁶ S. 1452 was reintroduced in the 80th Congress, 2d Sess., as S. 21. On June 7, two days before he submitted the report on the revision of Title 28, Senator Wiley of the Judiciary Committee submitted a report on S. 21 which adopted the memorandum of Circuit Judge Stone. S. Rep. 1527, 80th Cong., 2d Sess.

and the later application presents no new grounds. The amendment proposed to modify this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require its consideration. * * *

It is, accordingly, plain that Section 2244, like the original draft, granted the district courts broad discretion to refuse to entertain a successive application unless it states a "new ground" which the prisoner discovered after filing his former application.

2. The legislative history of Section 2255, although less complete than that of its companion habeas corpus provision, reflects a similar concern that the district courts not be compelled to grant successive hearings except in the event of discovery of new facts or a change of law. The original draft of the jurisdictional bill which became Section 2255 (H.R. 4233 and S. 1451, 79th Cong., 1st Sess.) contained no provision concerning successive motions, but a substitute draft (H.R. 6723, 79th Cong., 2d Sess.) provided that the action should be brought within a year after discovery of the facts relied upon or after a change of law:

Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant

⁷ No comment was made on the fact that the initial suggestion for unlimited rehearing before the judge who originally heard the writ was dropped. It seems evident, however, that this provision was no longer deemed necessary since the same result was accomplished by providing that a district court could, although it need not, consider a later application even though no new ground was raised.

of facts upon which he relies for relief, or (e) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon movant; and failure to file such motion within such time shall bar relief by the writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time.

In April 1947, the Habeas Corpus Committee of the Judicial Conference submitted a further report in which it expressed disapproval of H.R. 6723 solely on the ground that there should be no time limitation upon the release of a person wrongfully deprived of his liberty. The bill in its ultimate form (framed by the House Revisers and approved by the Judicial Conference) dropped the time limitation but contained the present provision that a court was not required to entertain a successive motion for similar relief. No further explanation of this provision appears in the available materials.

Thus, as to Section 2255 Congress rejected an inflexible time limit in favor of an approach which empowered the trial court to decide in its discretion whether a repetitive application should be entertained. The effect of the legislation is also to overrule that part of the decision in *Price v. Johnston*, *supra*, p. 19,* which required the government to raise

* *Price v. Johnston* was argued on December 16, 1947, and was decided on May 24, 1948. Thus the decision did not in-

the issue of abuse of the writ of habeas corpus if the district court were to rely on this ground for denying a hearing. The statute as enacted expressly provides that "*The sentencing court* shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" (emphasis added).¹⁵

C. IN DETERMINING WHETHER TO ENTERTAIN A SUCCESSIVE MOTION UNDER SECTION 2255, A SENTENCING COURT MAY PROPERLY CONSIDER THE PRISONER'S FAILURE TO RAISE THE POINT PREVIOUSLY.

Both this Court's pre-1948 decisions and the wording and legislative history of Section 2255 thus show that a prisoner's failure, in an earlier application, to raise grounds of attack on his conviction may provide the basis for denial of a hearing on a successive motion, unless the later motion either makes a convincing statement of merit or adequately explains the earlier failure to raise the point. In large part, such a limitation upon successive applications involves a common-sense recognition that the failure to utilize an earlier opportunity to rectify errors in a criminal judgment increases the likelihood that there is no real basis for the belated claim.¹⁶ If a prisoner has had and exercised an opportunity to test the procedures leading to his conviction, justice does not require that he also be entitled to an evidentiary hearing whenever he asserts as as-yet-untried factual claim.

olve Section 2255; nor was it of any effect in the consideration of that legislation. See *Dare v. Burford*, 329 U.S. 200, 212, n. 34, which discussed the similar position of *Wade v. Mayo*, 334 U.S. 672, with respect to the enactment of 28 U.S.C. 2254.

¹⁵This statutory change in the prior case law may well be explained by the fact that under Section 2255, unlike the situation with regard to habeas corpus, the prisoner's claim is to be

The issue of the voluntariness of guilty pleas which is involved in this case presents an excellent example. Once a prisoner knows that, if he has in some manner been unfairly induced to enter a plea of guilty, he has a ground for redress in the courts, the basis for his feeling that his rights were violated, if it has any justification in reality, will normally emerge in the first motion, however inartistically formulated. Particularly where, as here, the prisoner is aware of the specific basis of the remedy—*i.e.*, that an involuntary plea can be set aside—it is reasonable to expect that, if a prisoner really believes that he has been overreached, the facts which give rise to that feeling will be stated. Different and successive factual allegations to support a claim of involuntariness are rightly considered suspect.

Of course, the reason for the rule also limits its application. If a prior application was denied for reasons which were essentially procedural (such as a failure to detail adequately the grounds asserted), there would be no basis for treating a corrected application as successive. See *Waley v. Johnston*, *supra*, p. 19. It is only where a prisoner has had and exercised a meaningful opportunity to challenge the fairness of his conviction that he must proceed under an addi-

presented to the sentencing court which, in considering the successive motion, has immediately available the record of the original conviction and of the first motion. The sentencing court can thus often decide for itself, without waiting for the government's response, whether the new motion is so clearly related to the first that no further proceedings are necessary. The statute does not even require that notice be given to the United States Attorney where the motion and files and records conclusively show that the prisoner is entitled to no relief.

tional statutory burden in filing a successive motion. All of the surrounding circumstances may, of course, be considered. A lack of educational background and prior criminal experience may be considered on behalf of the prisoner. On the other hand, if the prisoner is engaged in a pastime of filing periodic motions (see e.g., *Lipscomb v. United States*, 308 F. 2d 420 (C.A. 8), certiorari denied, 371 U.S. 928), the court may spend less time considering his repetitive motions. If the prisoner in earlier motions to vacate his sentence has made factual allegations that have been determined to be unfounded, that may properly be weighed against him. So, too, if he is continually shifting from one ground for relief to another.

Congress laid down no absolute rule for determining the effect to be given a successive motion, and the full range of variant situations cannot be considered here. To be sure, a district court cannot escape the duty of considering a motion under Section 2255 merely because the prisoner failed to raise his claim earlier. But Section 2255 and its background do establish that a failure to make a claim later relied upon justifies the sentencing court in viewing a successive motion with suspicion and in imposing upon the prisoner an increased burden; that of explaining the earlier failure or presenting a ground for relief, which has earmarks of reliability.

II

THE DISTRICT COURT PROPERLY EXERCISED ITS STATUTORY DISCRETION IN THIS CASE

In support of his second motion to vacate his sentence under 28 U.S.C. 2255, petitioner alleged that he

"did not understand the trial proceeding" at which he pleaded guilty "owing to his mental incompetency", caused by the administration of drugs by medical authorities at Sacramento County Jail (R. 21). The sentencing judge, who had denied on the merits petitioner's first motion, based in part on an allegation that his plea of guilty was coerced, denied this second motion on the twofold ground that "there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion" and that a review of the record indicated that "petitioner's complaints are without merit in fact" (R. 23). We submit that both of these conclusions were correct and that they are properly to be considered together for the statutory bases of both are, as we have shown above, closely related.

The record shows that in January 1959, the trial judge carefully and conscientiously endeavored to discharge the duty imposed upon him by Rule 11, F.R. Crim. P., before accepting the plea of guilty. The record is clear that the judge took pains to make certain that petitioner knew of his right to counsel and was knowingly waiving that right.³⁹ He went on to explain to petitioner that he had a right to have a grand jury decide whether he should be charged at all and obtained an affirmative statement from peti-

³⁹ The record does suggest, although it does not make explicit, why counsel was waived. The fact that petitioner was arrested and given a preliminary hearing on the very day that the bank robbery occurred suggests that petitioner was sighted in the act. The Department files confirm that fact. They also confirm that petitioner had a prior criminal record.

titioner that he wanted to waive that right. He also inquired whether petitioner was pleading guilty voluntarily, without promises or inducements, and whether petitioner understood the nature of the charge. Only after receiving affirmative answers to all of these questions did the judge accept the plea of guilty. It is apparent from the record that he had opportunity to observe petitioner. It is equally plain that a judge who was as conscientious in performing his duty as the trial judge was here would not have permitted the arraignment to go forward if he had any doubt as to the attention and understanding he was getting from the petitioner. Moreover, the record affirmatively shows that petitioner understood the proceedings. When the judge asked him whether he wished to have the matter heard by a grand jury, petitioner answered, "No, your honor, I waive it." And when the judge did not hear his answer, petitioner repeated, "I waive that right" (R. 33). Thereafter, petitioner in open court signed a document which was witnessed by the deputy marshal (R. 3).

The judge did not sentence petitioner until he had received a pre-sentence report almost three weeks later. That report, which is confidential, is not part of the record before the Court, but was before the judge at the time of sentencing and is part of the record available to the judge in considering the motion under 28 U.S.C. 2255. From the record alone it appears that the pre-sentence report must have discussed petitioner's addiction to narcotics, for the judge accepted without question petitioner's statement that he would like to be sent to a prison where he would be

treated for addiction.¹¹ And it can be presumed that the pre-sentence report contained both a summary of the nature of the crime and of petitioner's criminal record. Thus, before sentencing petitioner, the court had petitioner's solemn assurances that he was pleading guilty voluntarily, the benefit of its own observation of petitioner at the time the plea was accepted and at the time sentence was imposed, the pre-sentence report, and petitioner's own volunteered statement seeking confinement at a medical facility. The judgment against petitioner was not entered in careless or hasty fashion.

Almost a year later, the sentencing judge considered petitioner's case again on his motion to vacate sentence filed from McNeil Island, in which he claimed that he had been coerced into pleading guilty without counsel and without knowledge of the charges against him. Contrary to petitioner's present contention, this motion was not denied because of a deficiency in form but was denied after full consideration. It is true that the court stated that the motion sets forth no facts to support its conclusions and that this deficiency could be a basis for denial. But the court did not refuse relief on this ground. Rather, it rejected petitioner's assertions of intimidation and coercion and denial of counsel only after it examined the files and records of the case. The trial judge

¹¹ We have confirmed the fact that the probation officer's report (which is not part of the record in this Court) does refer to the petitioner's history of addiction. We have also ascertained from the report that petitioner received medical treatment for withdrawal symptoms while he was in jail prior to sentencing. The probation officer's report does not indicate the nature of the treatment or the precise time at which it took place.

specifically pointed out that the record showed that the court explained to petitioner his right to counsel and the charge which he faced, that it reflected understanding on the part of petitioner, and that with understanding, in the absence of threats or promises, petitioner "freely and voluntarily of [his] own will and wish" waived indictment and counsel and entered a guilty plea. This was a denial on the merits.

Nine months later, after petitioner had been transferred to Alcatraz, he formulated a new way of attacking the plea of guilty. Petitioner's second motion was not a mere correction of the first motion. While both motions contended that his guilty plea was not voluntary, they asserted different reasons for that claim. The first motion contended that the plea was involuntary because petitioner had been intimidated and coerced into a guilty plea without counsel and without knowledge of the charge against him. The second motion contended that his plea was involuntary because he was rendered mentally incompetent by medication. The first motion presupposed an awareness of the proceedings but charged that illegal pressure was deliberately used to bring about a guilty plea. The second motion asserted an unawareness of the proceedings but did not charge that illegal means were deliberately used to coerce the guilty plea.

It was thus against a full and persuasive background that the sentencing judge denied petitioner a second hearing under 28 U.S.C. 2255. The record here shows (1) a careful attempt by the trial judge to make certain that petitioner was aware of all his rights and that he was knowingly and deliberately

pleading guilty; (2) a probation report before sentencing in which the fact of narcotics addiction was, in all probability, brought to the attention of the district court; (3) an earlier awareness by petitioner that there was a remedy for a plea of guilty involuntarily entered and an earlier attempt to invoke that remedy without even making mention of incompetence because of the use of drugs; and (4) an earlier attempt to invoke that remedy on the basis of allegations that were affirmatively contradicted by the record. Under these circumstances the trial judge, who had carefully reviewed the record at the time of the first motion, could properly conclude that a second motion, unsupported by any explanation of the failure to raise its grounds in an earlier motion, should be denied without hearing. This disposition was not only supported by this Court's decisions prior to 1948 but was expressly authorized by 28 U.S.C. 2255, which provides that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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